SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 303

UNITED STATES, APPELLANT,

vs.

VON'S GROCERY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA

Volume II

INDEX

[fol. 935] DEPOSITION OF SPENCER L. MCKERNAN, taken on behalf of the Defendants, at 433 South Spring Street, Los Angeles, California, at 11:45 A.M., Thursday, April 18, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

SPENCER L. MCKERNAN, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Vaughn:

Q. Mr. McKernan, will you state your full name?
A. Spencer McKernan.
Q. Where do you reside, sir?
A. Glendale.
Q. What address?
A. 506 North Kenwood.
Q. You own a grocery store, or I take it that you are president of Bauer-McKernan, Inc.; is that correct?
A. That's correct.
Q. It is a corporation?
A. Yes.
Q. That operates a store under the name of Garfield Markets?
A. Yes.
[fol. 936] Q. And that market is located at 4603 San Fernando Road, Glendale?
A. 4602.
Q. And the same corporation operates another Garfield Market in Santa Maria, California, does it not?
A. No. The name of the market is the Santa Maria Market in Santa Maria.
Q. But it is owned by the same corporation, Bauer-McKernan, Inc., or does your corporation have any other stores?
A. No.
Q. Has it ever operated any other stores?
A. No.

Q. Santa Maria, by the way, is outside of Los Angeles and Orange Counties, is it not?

A. Yes.

Q. It is in Santa Barbara County, if I am not mistaken?

A. Yes.

Q. Mr. McKernan, how large is the size of your store in Glendale?

A. Oh, it's just a small store. You mean in square foot?

Q. Yes. If you can give us an approximation.

A. Oh, I imagine about 3000 square feet. That is just a guess.

[fol. 937] Q. Comparatively speaking, that is a small store for this area, is it not?

A. Yes.

Q. When did you first acquire that store?

A. Oh, about eight or nine years ago.

Q. Had you before that time ever operated a grocery store?

A. Mostly produce stores.

Q. But never with a complete line of grocery products, I take it?

A. No.

Q. Do you work in the store yourself, sir?

A. Yes.

Q. Do you have any other employees?

A. Yes.

Q. How many?

A. I have two full time, two part time.

Q. You say that you acquired the store eight or nine years ago. From whom did you acquire it?

A. Well, the man that had it before, his lease ran out and the landlord wasn't satisfied with him so he moved him out and I released it and opened it.

Q. Did you acquire any of the fixtures or merchandise from the prior owner?

A. No.

[fol. 938] Q. Do you know the name of the prior owner?

A. Yes, I do. I can't think of it right now.

Q. That's all right, it isn't that important. What were the sales in your store during the first year of its operation?

A. I don't remember.

Q. Approximately.

A. Around $15,000 a month.

Q. Just so I can relate this to years, which I am used to dealing with, let me do a little multiplication. That is $180,000 a year; is that approximately correct?

A. Yes.

Q. What were your sales in the last year, 1962, can you tell me?

A. Around thirteen.

Q. In other words, your sales had dropped since the first year of operation?

A. Yes.

Q. Has this drop been a steady decline or did you go up and then down?

A. No, it is hard to say. Sometimes up and down, but it seems to be more or less of a steady.

Q. Decline?

A. Steady decline.

Q. Can you describe the neighborhood that surrounds [fol. 939] your store?

A. In what way?

Q. Well, what is to the north of your store?

A. Apartment houses, single dwellings.

Q. Apartment houses and single dwellings?

A. Uh-huh.

Q. Isn't there some industrial?

A. Most of the industrial is to the west.

Q. That is about a hundred per cent industrial to the west, is it not?

A. Yes, for several blocks.

Q. How about to the east and west?

A. The west is in the industry. In the east is mostly residential.

Q. How about the south?

A. Well, right on San Fernando Road it is industrial. But there is residential too after you get back one block from San Fernando Road.

Q. Has the character of your neighborhood changed over the last eight or nine years?

A. How do you mean that?

Q. Has it become more industrial and less residential?

A. Yes, it has.

Q. So that this means, I take it, that industrial neighborhoods do not supply the same customers that residential [fol. 940] neighborhoods do.

A. No.

Q. So would you say that a part of the decline, or one of the reasons for the decline in your sales has been the change in the character of your neighborhood?

A. I don't think so. I think there is as many people live in the neighborhood because there has been construction of apartment buildings in this same residential area. They are growing up continuously all the time.

Q. San Fernando Road is a main traffic artery, is it not?

A. Yes.

Q. Are you located at a corner or in the middle of the block?

A. There is a drugstore on the corner and we are the next store.

Q. San Fernando Road might be described as a fast traffic highway; isn't that so?

A. Yes.

Q. Not quite a freeway but almost.

A. Almost.

Q. Would you tell me the names of those of your competitors in the immediate area of your store and about how far away they are, the markets that you think you compete with?

[fol. 941] A. Well, King Cole is one.

Q. How far away is that?

A. About eight blocks. And Better Foods is about the same distance, about eight blocks. Cracker Barrel ten or twelve blocks. And then there is Ralphs and Alexander's, about ten or twelve blocks. Thriftimart about 15, Shopping Bag about 13. And then there is some other markets on the eastern side of town. I don't know just how far away they are.

Q. Any independent markets or single stores?

A. Well, there is. There are some small stores within the area but I don't know their names.

Q. About how many are there, would you say, within 15 blocks of your store?

A. To make a wild guess, about 12.

Q. And these are all small markets, you say?

A. Yes.

Q. About the size of yours?

A. Average, yes. Smaller and larger. Some of them a little bit larger.

Q. The same approximate size?

A. Yes.

Q. When was the King Cole Market opened, do you remember?

A. No, I don't.

[fol. 942] Q. Was it there before you operated it?

A. Yes.

Q. The King Cole chain has now disbanded, has it not?

A. I believe so.

Q. And many of the King Cole Stores were sold off to former employees of King Cole, were they not?

A. I believe so.

Q. Who operates the King Cole near you?

A. I don't know.

Q. But so far as you know it is a single store operator operating under the name King Cole; is that right?

A. I believe so, yes.

Q. The Better Foods Store, when was that built?

A. Oh, it has been there for years. I don't know how long.

Q. Long before you came along?

A. Yes.

Q. How about the Cracker Barrel?

A. Oh, it has been in recent years but I don't know how many.

Q. Within five years?

A. No. About eight years, I imagine.

Q. About the same time that you came to the area; is that right?

A. Just about.

[fol. 943] Q. Cracker Barrel is a chain of about two stores, is it not? Don't they have about two stores generally in the Glendale area?

A. I believe.

Q. When was the Ralphs open?

A. It has been a long time ago.

Q. Is that on San Fernando Road?

A. No. That is on Orange. It is more towards the center of Glendale.

Q. How about the Alexander's?

A. Same location there, parking lot joined.

Q. In other words, there is an Alexander's right next door to the Ralphs with a joint parking lot?

A. Not joined. Part of the lots do join.

Q. Has the Alexander's Market been there as long as you have been there in the area?

A. Yes.

Q. How about the Thriftimart?

A. Well, it is a new market within the last, oh, five to eight years.

Q. The Shopping Bag?

A. About the same time.

Q. When you first went into this community about how many small stores, operated by single store operators, were there?

[fol. 944] A. I am trying to count the ones that are not there any more. About three less than there is now.

Q. In other words, there were approximately 15?

A. Yes.

Q. Let us talk about those three. What was the first one to go, to leave the business?

A. Well, one of them, his name was Bogard.

Q. Do you know why he went out of business?

A. Well, he attempted to sell out. His business was down and he couldn't sell so he just had to fold up.

Q. How large a store was he operating?

A. Just a small store.

Q. Smaller than yours?

A. Yes.

Q. What is at that location now?

A. Cleaners—drive-in cleaners and a laundromat.

Q. How about telling me about one of the others?

A. Another one was Long's Market.

Q. Is that a small store?

A. About the size of mine.

Q. When did it go out of business?

A. About three years ago.

Q. How about Bogard's, when did that go out of business?

A. Oh, about three or four years ago.

[fol. 945] Q. What is now in the location that Long's Market formerly occupied?

A. I really don't know.

Q. It could be a market, couldn't it?

A. It isn't, no.

Q. You are sure of that?

A. Yes, I am sure of that.

Q. What is the other one, then?

A. Let's see, what the dickens was the name of the place? I don't really remember the name even.

Q. Did you know the operators?

A. No.

Q. When did they go out of business?

A. Oh, I would say a couple of years ago. That is just a guess. I haven't been on that street for a long time.

Q. Do you know why they went out of business?

A. No.

Q. Do you know what is there now?

A. No.

Q. It could be a grocery store?

A. Could be.

Q. About Long's Market, let me ask you this: Do you know why they went out of business?

A. Well, the Thriftimart and Von's opened up right practically on the other side of the street within several [fol. 946] blocks of him.

Q. You mean the Thriftimart and Shopping Bag?

A. And Shopping Bag, yes.

Q. How do you know that this caused him to go out of business?

A. Well, I don't know it exactly but that was about the time that he went out.

Q. Did you tell me what was now at the Long's Market location? I guess you said you didn't know.

A. I don't know for sure.

Q. May I ask your age, Mr. McKernan?

A. Fifty-nine.

Q. We have been supplied, Mr. McKernan, with a copy of a statement which purports to be the statement of your testimony. Do you have a copy of that with you?

A. No, I don't.

Mr. Vaughn: Do you have a copy he might look at?

Mr. Coyle: We have an extra copy that he can have.

Mr. Vaughn: Q. Would you look at that and see if you can identify it for me?

A. Yes, I signed this.

Q. You signed that statement. Would you refer to Paragraph 3 of that statement, and particularly the first sentence where you say, "On the basis of his continued study of retail grocery merchandising in the Los Angeles metro- [fol. 947] politan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined." What area were you there referring to, sir?

A. Well, the Glendale area is more——

Q. The 15 blocks that you were referring to?

A. Well, the whole City of Glendale. And from what I hear from other parts of town as well. I mean a lot of things that I hear in the produce market, where all the fellows congregate to do the buying.

Q. You hear about stores going out of business; is that right?

A. Yes.

Q. But the only place that you are personally familiar with is the Glendale area; isn't that so?

A. That's right, yes.

Q. And in that area you have referred to three stores that went out of business in the last eight or nine years?

A. That is within three in this 15 block area.

Q. These, I take it, are the only stores that you are personally aware of having gone out of business aside from what you have learned through conversations; is that right?

A. Yes.

Q. You know also, sir, do you not, from your experience [fol. 948] in the industry, from your conversations about the produce market and from your continued study of the business, that there are other concerns who have entered the market in the last 13 years?

A. Yes.

Q. Would you be able to tell me if the number who have entered the market are greater or less than the number that have left it?

A. You mean in our area?
Q. Let us talk about your area to begin with.
A. Well, I believe it is less.
Q. You mean fewer have entered——
A. Fewer have entered.
Q. —than have left the business?
A. Yes.
Q. How about in the Los Angeles metropolitan area as a whole?
A. Well, I think quite a few more have entered.
Q. And this is based again on the conversations that you had at the produce market; is that right?
A. Yes.

Mr. Coyle: I wonder if he could repeat that answer.
Mr. Vaughn: Would you read the question and answer, please.

(The reporter read the record as requested.)

[fol. 949] Mr. Coyle: Is that your answer?
The Witness: Does that mean small stores or chain stores?

Mr. Vaughn: Q. Let us talk about small stores.
A. I don't think too many small stores.
Q. How about just single stores, not whether they are large or small?
A. I don't think there is really very many.
Q. There have been some very successful operators who have entered the business since 1950, have there not?
A. A few, yes.
Q. Isn't King Cole an example of a chain that started up after the war and grew in size?
A. I don't know when they started.
Q. Are you familiar with the operations of Joe Hughes, Hughes Markets?
A. Yes.
Q. Do you know when he opened his first store?
A. No.
Q. Do you know that he started with only one store?
A. Yes.
Q. Do you know whether he had opened that first store sometime after 1950?

A. I believe he did.

Q. And he now has 14 stores or so, does he not
[fol. 950] A. That's right.

Q. And that he is apparently a very successful market operator; is that correct?

A. Yes.

Q. You know in the Glendale area a store called Jack's Ranch Market?

A. No.

Q. There is a ranch market out there in Glendale, isn't there?

A. I don't believe so, no.

Q. Isn't there a market up on San Fernando Road in Glendale operated by a man named Nate Gilbert and some partners of his?

A. That is Bill's Ranch Market.

Q. Bill's Ranch Market, that's right. Do you know anything about that operation?

A. Very little.

Q. Do you know that it started out after the war, that that location was formerly a garage?

A. No, I don't really remember what was there.

Q. Are there any automobile dealers who have their businesses near yours?

A. Most of them are on Brand Boulevard, which is about, oh, six blocks from our store.

Q. I take it, though, there are some automobile dealers, [fol. 951] new or used car dealers, near your store on San Fernando Road.

Mr. Knight: I would like to object as to the relevancy to the grocery industry of the automobile industry.

Go ahead.

Mr. Vaughn: Q. You may answer, sir.

A. Car dealers on San Fernando Road?

Q. Yes.

A. There are none.

Q. You have heard it said, have you not, that one of the worst places to locate a grocery store is on automobile row?

A. That's right.

Mr. Knight: Before you answer the question I object on the ground that it obviously calls for hearsay.

Mr. Vaughn: Q. You may answer.

A. I have heard that, yes.

Q. Do you know whether or not Bill's Ranch Market is located on an automobile row?

A. It isn't.

Q. Do you know whether Bill's Ranch Market has any entrance on the street?

A. I don't believe they have, no.

Q. Did you ever try to get into a shopping center, Mr. McKernan?

A. Yes.

[fol. 952] Q. Would you tell us about that, when it was and who you dealt with?

A. Well, I tried to get into one on Los Feliz—not Los Feliz, Chevy Chase and Central.

Q. When was that?

A. Oh, about five or six years ago. And the man said that if he couldn't get one of the chain markets in that he wouldn't put in a shopping center.

Q. Any other attempts to get into a shopping center?

A. Well, I tried to get in one up in Santa Maria but I didn't have enough money.

Mr. Knight: We will strike that answer since Santa Maria is out of the L.A. area.

Mr. Vaughn: Q. Did you have enough money to get into the one in Los Angeles County five or six years ago?

A. I would have had.

Q. Any other efforts to get into a shopping center?

A. No.

Q. Would you say that not all of the good locations in Los Angeles County are in shopping centers?

A. I didn't quite understand that.

Q. Not all of the good locations, grocery locations, are in shopping centers; isn't that so?

A. There are some that are not.

Q. There are a very large number that are not, are there [fol. 953] not?

A. Yes.

Q. Was Von's able to get into shopping centers prior to its merger with Shopping Bag?

A. Yes.

Q. Was Shopping Bag able to get into shopping centers prior to its merger with Von's?

A. Yes.

Q. Is Von's now able to get into shopping centers?

A. Yes.

Q. Did the merger of Von's and Shopping Bag create the problem which you have referred to in Paragraph 4 of your statement with respect to the inability of smaller concerns to get into shopping centers?

A. I wouldn't say that Von's alone did.

Q. My question was: Did the merger of Von's and Shopping Bag create that problem?

A. Not entirely.

Q. Did it aggravate it in any way?

A. No, I don't believe so.

Q. In other words, the merger itself had really no effect whatever on the inability of small concerns to get into shopping centers; isn't that correct?

A. That's right.

Q. Are you a member of any cooperative?

[fol. 954] A. Certified Grocers.

Q. Certified Grocers has large warehouses, does it not?

A. Yes.

Q. It has large trucking facilities?

A. Yes.

Q. Deliveries are made to certified warehouses directly by railroad shippers?

A. Yes.

Q. They have spur tracks at their warehouses; is that right?

A. That's right.

Q. Do you feel that you can get your dry groceries from Certified as cheaply as the chains can get their dry groceries to their stores?

A. In certain items I think so.

Q. Most of the items; isn't that so?

A. Well, I don't know whether we can or not. We don't know what kind of deals are being offered.

Q. In other words, you don't know what the chains' cost is so you can't tell me whether you get the products as

cheaply through Certified as the chains who operate warehouses get it; isn't that so?

A. That's right.

Q. So you don't know whether operating your own ware-
[fol. 955] house is an advantage or it is not; isn't that so?

A. Well, I don't think we could operate without it.

Q. You don't know whether the fact that the chains have their own warehouses constitutes an advantage to them or not, do you?

A. Well, just do a little bit of reasoning. If they weren't an advantage they wouldn't have it.

Q. Let's explore that a minute. Don't you think that the chain has far greater distribution problems with, say, 70 stores than you do with one?

A. Yes.

Q. Don't you think the time might come when a chain is growing in size and has more stores where it simply cannot grapple with the problem that it has unless it has its buying and warehousing functions out of the hands of a middle man and does it itself, just to break even? Isn't that possible?

A. It is possible.

Q. So isn't it possible that chains have built warehouses and maintained their warehouses so that they can deal with the complex problems they have of distribution just to get back to the place that you are already in terms of their cost?

A. I don't think that they could operate their warehouses any cheaper than they were before.

Q. They couldn't operate their warehouses any cheaper
[fol. 956] than Certified does, could they?

A. No.

Q. So in terms of their so-called advantage in having a warehouse, it might not be an advantage at all; isn't that true?

A. Well, there is a lot of advantages. For instance their buying power. There are unheard of deals that they get if they take a certain amount of merchandise.

Q. I thought you just told me that you didn't know what those deals were.

A. Well, I have heard. I don't know but I have heard. And there is a distinct advantage in the delivery service

from their own warehouse, because, for instance, if Certified was delivering it, why, Certified wouldn't have the power to tell the store that when the truck stops you take the merchandise and get it off the truck so we can go on. Where they can do that.

Q. You mean there is a saving in labor because of that?

A. Yes.

Q. Let us talk about the deals that you say exist. What sort of deals are you talking about?

A. Well, discounts that are allowed for larger purchases at one time.

Q. Isn't it so that Certified purchases more groceries [fol. 957] than any chain in the Los Angeles metropolitan area?

A. Yes.

Q. In greater volume than any chain?

A. That's right.

Q. Don't you think they get the same quantity discounts?

A. No.

Q. You do not?

A. I do not.

Q. You think the chains get greater quantity discounts on smaller purchases than Certified does on greater purchases?

A. Yes, I do.

Q. Any other deals that you have in mind?

A. Well, for instance the ice cream setup. The larger amounts you buy the more discounts you get.

Q. Certified is now selling ice cream, isn't it?

A. They are now, yes. They started.

Q. And you still think that the chains get a better deal on ice cream because they buy greater quantities?

A. I think they make their own, most of them.

Q. Now Certified is making ice cream, isn't it?

A. I guess so. I don't know exactly what the deal is. And wine is another item.

Q. Wine?

A. Yes.

[fol. 958] Q. You carry wine in your store?

A. Yes.

Q. Do you carry other brands of liquor?

A. No, no liquor.

Q. Just wine and beer?

A. Wine and beer. Milk is another one.

Q. Milk is another one?

A. Yes.

Q. Let us talk about milk for a minute. What milk do you use?

A. Adohr and Knudsen.

Q. Von's uses Jerseymaid, doesn't it?

A. I believe so.

Q. Adohr and Knudsen are two highly advertised and well promoted products, are they not?

A. Yes.

Q. They are more highly advertised and better promoted and more widely used than Jerseymaid; isn't that so?

A. Well, I wouldn't say they are more widely used because I don't know just how many of the chains handle Jerseymaid.

Q. Wouldn't you say there are more stores using Adohr and Knudsen than there are using Jerseymaid in the Los Angeles metropolitan area?

A. I believe so. But volumewise I don't think so.

[fol. 959] Q. In other words, you think that the volume may be about the same?

A. I wouldn't be in a position to say.

Q. You don't know?

A. No.

Q. Do you think the fact that Von's sold Jerseymaid milk in its store and you sell Adohr milk in your store and Knudsen milk gives Von's any competitive advantage? In other words, does it attract customers away from your store and to a Von's Store?

A. Not on milk. But on some of the by-products I think they do.

Q. Such as?

A. Well, ones that are not controlled by State price.

Q. Such as?

A. Cottage cheese, and I think buttermilk. And there are some more of them that there is no price set that they can sell it at.

Q. They can't compare it to milk, can they?

A. No.

Q. Milk is one of the biggest volume items in a grocery store, isn't it?

A. Yes.

Q. And the price at which you can sell your milk and the price at which Von's can sell its milk is the same by [fol. 960] reason of State law; isn't that correct?

A. That's right.

Q. So in terms of milk, at least, Von's has no competitive advantage over you by reason of the fact that it has Jerseymaid; isn't that right?

A. Not in the price that they get for it but the price they pay for it they do have.

Q. How does that give them a competitive advantage over you? They are just making more profit, aren't they?

A. That's right.

Q. And you object to that?

A. No. What they can do, though, they can make more profit on milk and they can turn around and sell the cottage cheese below what we pay for it.

Q. Von's is a partner in Jerseymaid; is that not true?

A. I don't know.

Q. Von's has some ownership interest in Jerseymaid, you know that?

A. I believe so, yes.

Q. You own a trout farm?

A. Yes, sir.

Q. And that is an investment which makes money for you?

A. Very little.

Q. But some; right?

A. Well, it hasn't in the last few years, no. I hope.

[fol. 961] Q. Von's could have invested in a trout farm or it could have invested in real estate or common stocks instead of investing in Jerseymaid and presumably made as much money—as much profit as it does out of Jerseymaid; isn't that true?

Mr. Knight: Before you answer, I object to the question on the ground that it calls for a speculative answer.

Go ahead.

The Witness: Possibly.

Mr. Vaughn: Q. Is there any doubt about that in your mind?

A. I don't know what percentage of profit they are making in the milk.

Q. Do you know about the cooperative dairy known as Golden Cream?

A. Very little.

Q. Did you ever try to get into Golden Cream?

A. No.

Q. Do you think you could have taken that money that you invested in the trout farm and invested in Golden Cream instead?

Mr. Knight: Before you answer I make the same objection as to the previous speculative question, as calling for wild guessing and speculation on the part of the witness and is not factual.

Go ahead.

[fol. 962] The Witness: What was the question?

Mr. Vaughn: Would you read it back, please.

(The reporter read the pending question.)

The Witness: I don't know just what the requirements are to get into Golden Cream.

Mr. Vaughn: Q. You never tried, in other words?

A. No.

Q. Prior to the merger of Von's and Shopping Bag was the retail grocery business in the Glendale area vigorously competitive?

A. Yes.

Q. Is it more or less competitive today?

A. I believe it is more. There are more chains there now.

Q. So is it fair to say that since the merger of Von's and Shopping Bag you have seen no lessening in competition in the Glendale area?

A. No.

Q. It is fair to say, in other words, that there has been no lessening of competition in the Glendale area since the merger; isn't that correct?

A. No lessening.

Q. Do you know of any place in the Los Angeles metro-

politan area where there is less competition today, less vigorous competition today than there was in 1960?

[fol. 963] A. No.

Q. Would you look at Paragraph 13 of your statement, Mr. McKernan. Before I get to questions about that let me also ask you, have you noticed any changes since 1960 in grocery retailing? And I would like to refer specifically to the sale of groceries through discount houses.

A. Well, it hasn't affected our area very much.

Q. It hasn't?

A. No.

Q. But you are aware from your study of the industry that since 1960 there have been a number of discount houses opened with food departments, are you not?

A. Yes.

Q. And this is relatively a new form of competition since 1960, is it not?

A. Yes.

Q. Are you also aware of the opening of what is sometimes referred to as bantam stores?

A. Well, I have heard of it, but still the same thing, it hasn't affected our area very much.

Q. But you have heard that since 1960 a number of bantam stores have been opened?

A. Yes.

Q. This also represents a new form of competition, does it not?

[fol. 964] A. Yes.

Q. Are there any liquor stores in the 15 blocks surrounding your store?

A. Yes.

Q. Have you noticed in the last ten years, eight or nine years, that these liquor stores, or some of them, have carried an increasing line of grocery products?

A. Yes.

Q. There are some liquor stores that sell as many groceries as a small grocery store; isn't that so?

A. Yes.

Q. And this is a relatively new development in grocery retailing in Los Angeles, is it not?

A. That's right.

Q. And there are also drugstores in your community,

are there not, which sell many of the products which you sell in your own store; isn't that right?

A. Yes.

Mr. Coyle: We object to these questions on the grounds that they are getting outside the stipulated relevant market, when you get into drugstores and liquor stores.

Mr. Alsup: Your stipulated market area is groceries and related products.

Mr. Coyle: Classified as products taken as a whole which are sold in grocery stores.

[fol. 965] Mr. Vaughn: Q. Let us get back to Paragraph 13. Would you tell me what acquisition and consolidations in the grocery field you referred to in that paragraph?

A. Well, it seems that there has been several of the chains that have merged and taken over maybe smaller chains.

Q. What chains have merged with what chains?

A. Well, for instance Food Giant bought, oh, they bought a store in Toluca Lake and one in Van Nuys, and Fox Markets bought several. I don't just remember the names of different ones that sold.

Q. Is that all you can think of at the moment?

A. That's all I can think of right now.

Q. You said Food Giant bought a store in Toluca Lake. Is that still being operated as a Food Giant Store?

A. I don't know whether it is or not.

Q. Can you tell me where that is?

A. It was on——

Q. Alameda?

A. Alameda and Riverside, I believe.

Q. Do you know if that store is now being operated as the Toluca Mart by a single store operator?

A. I don't know.

Q. You say that Fox acquired several stores. Fox was a concern that started in the grocery business in Los Angeles in about 1954; isn't that right?

[fol. 966] A. I don't know exactly, no.

Q. Since 1950, though?

A. Yes.

Q. And it expanded very rapidly, did it not?

A. Yes.

Q. And ultimately in about 1960 it went into bankruptcy; isn't that so?

A. Yes.

Q. Do you know the reason why it went into bankruptcy?

A. No.

Q. Have you heard that it went into bankruptcy because it expanded too rapidly with inadequate capital?

A. I have heard that, yes.

Q. Don't you believe that is the reason it went into bankruptcy?

A. Well, I wouldn't say whether I believe it or don't.

Q. You don't know what the reason is?

A. No.

Q. But in any event they did go into bankruptcy?

A. Yes.

Q. Since that time many of their stores were sold off to single store operators; isn't that so?

A. Yes.

Q. And the remaining 18 Fox stores are now being operated by Food Fair; isn't that so?

[fol. 967] A. I believe so, yes.

Q. And Food Fair is one of the largest national chains in the country; isn't that correct?

A. Yes.

Q. Prior to the time that it took over the Fox Stores it was operating no stores in the Los Angeles metropolitan area; isn't that so?

A. I don't know about the Food Fair.

Q. Food Fair, since it took over the Fox operation, is also operating Golden Rule Discount Houses, is it not?

A. I don't know.

Q. If you would read paragraph 14 of your statement for me, please. You state there that there will probably be subsequent mergers between and involving other major chains. It has been three years since the merger of Von's and Shopping Bag, hasn't it?

A. I ddn"t know exactly.

Q. If I were to tell you that the merger occurred in 1960 you wouldn't say I was wrong, would you?

A. No.

Q. And since that time how many mergers have there been in the retail grocery business?

A. Well, I don't know exactly.

Q. You don't know of any, do you?

A. No.

[fol. 968] Q. What makes you believe then that there will be subsequent mergers?

A. Well, it just seems to be the trend of the times.

Q. In other words, you are only able to tell me, though, about Food Giant picking up two stores and Fox now a bankrupt corporation picking up several. Where is the trend?

A. Well, there is a trend and if I had time to go out and check it out I could probably tell you a lot more of them.

Q. But you don't know of any merger since the Von's-Shopping Bag merger?

A. Not right offhand, no.

Q. So this didn't exactly set off a wave of mergers, did it?

A. No.

Q. In fact it doesn't appear to have set off any; isn't that so?

A. Well, I am not in a position to answer that.

Q. You don't know?

A. No.

Q. Who are the firms that you anticipate will merger in the future?

A. I have no idea.

Q. Do you think Ralphs will merge?

A. I don't know.

[fol. 969] Q. Do you think Safeway will merge?

A. I don't know.

Q. In other words, your opinion is pretty much speculation as to what will happen in the future.

A. That's right.

Q. Do you think that maybe somebody will merge with somebody but you can't tell me who?

A. Well, I do know of instances where some concern would acquire two or three stores and then they would sell to a chain.

Q. Tell me about those.

A. Well, I would have to stop and think just who they

were. Well, Hughes is one. Wasn't he at one time one who built up a small chain and then sold out?

Q. Not that I know of, sir, but you are testifying. Do you think that Hughes at one time built up a small chain and sold it to someone; is that correct?

A. I think so.

Q. Can you think of any others?

A. Not right offhand I don't, no.

Q. Are you aware of the fact that you are not the only Government witness?

A. Yes.

Q. Do you know that the other Government witnesses in this case have signed statements which are almost identical [fol. 970] to the one that you signed?

A. I don't know what they signed, no.

Q. I take it that this statement was presented to you for your signature already prepared, was it not?

A. Yes.

Q. And these are not your words, are they?

A. No.

Mr. Vaughn: I have nothing further.

Cross-examination

By Mr. Knight:

Q. Mr. McKernan, counsel asked you a question concerning a tightening up, an increase of concentration of competition in the grocery business since the merger and I believe your answer was that you didn't know of any actual increased competition. This Bogard and Long, do you know whether the stores which were formerly there are presently grocery stores?

Mr. Vaughn: I will object to the form of the question as improperly characterizing the witness's prior testimony—he didn't say anything of the kind—and also that it is leading and suggestive.

Mr. Knight: Q. Would you answer the question.

A. What is the question? Would you repeat the question?

Q. Do you know who is presently occupying the prem-

[fol. 971] ises formerly occupied by the Bogard Grocery Store that you mentioned?

A. I don't know who it is, no.

Q. Do you know whether it is a grocery store?

A. I think that Bogard's is a laundromat.

Q. And concerning Long's?

A. I don't know for sure what is in there.

Q. And Long's once was a grocery store?

A. Yes.

Q. And approximately how close was that to you?

A. Oh, that was about 12 blocks, something like that.

Q. Do you know whether that is presently a grocery store?

A. I don't know.

Q. There was a third store in the neighborhood that you mentioned as having gone out of business, the name of the proprietor you couldn't recall. Can you think of that now, who the owner was?

A. Yes. It was Woody's Market.

Q. Do you know the address of that?

A. It was on South Brand Boulevard.

Q. Do you know what presently is in that location?

A. No, I don't. But I know it is not a grocery store.

Q. I believe you stated, Mr. McKernan, that you presently are a member of Certified Grocers.

[fol. 972] A. Yes.

Q. Is there a membership fee involved in joining Certified?

A. Well, you have to own a share of stock and there is so much fees per month.

Q. What do the monthly fees cover?

A. Your right to belong is all I know of.

Q. Have you ever in your history as a grocer, Mr. McKernan, ordered something from Certified and found that they were in short supply of that item or possibly out of it altogether?

A. Yes.

Q. Would you care to tell us about that, please?

A. Well, quite a few items. Almost every week we will have several items that they are in short supply of.

Q. For how long a period of time, Mr. McKernan, has this been going on?

A. How long has it been going on?

Q. Yes.

A. Well, I have noticed it more in the last, oh, three years than before.

Q. Have you ever at any time at your present store in Glendale wanted to put on a special of a certain item and found that Certified was in short supply of that item?

A. We have learned to get the item first if we are going [fol. 973] to put on a special.

Q. Approximately how much in advance do you have to order that particular special that you want to put on on a given weekend?

A. Well, if we are going to have a special next week we would attempt to get the item this week. If we wouldn't get it we wouldn't put it in on the special.

Q. You don't have a warehouse, do you?

A. No, sir.

Q. Mr. McKernan, how many of those so-called grocery cooperatives are there in the Los Angeles metropolitan area, including Orange County, at the present time, if you know?

A. Well, I think about three that I know of.

Q. Would you name them for us please?

A. It would be Orange Empire and Certified and Smart & Final, which is, I think, now owned by one of the chains.

Q. When you say "one of the chains," do you mean one of the grocery chains?

A. Yes.

Q. Would it refresh your recollection if I told you that Thriftimart owns Smart & Final?

A. Yes.

Q. Do you know, Mr. McKernan, whether Orange Empire services Glendale independent grocery stores?

A. Yes.

[fol. 974] Q. Does it serve the entire area of Glendale?

A. I am not sure.

Q. Do you know, Mr. McKernan, whether Certified Grocers within the past few years acquired the Spartan grocers?

A. Yes.

Mr. Vaughn: I will object to the question as being immaterial.

Mr. Knight: Q. At any time during your career in the grocery business, Mr. McKernan, were you a member of Spartan?

A. No.

Q. You were always a member of Certified?

A. Yes.

Q. Do you recall a wholesale grocery firm in the greater Los Angeles area within the past few years known as Market Wholesalers, Incorporated?

A. Yes.

Q. Do you know whether that organization is still in existence, sir?

A. I don't know.

Q. Do you know whether Certified Grocers took that over?

A. I don't know.

Q. At any time, Mr. McKernan, have you had to travel [fol. 975] either by automobile or by pickup truck to a Certified warehouse to pick up groceries that you might need?

A. Yes.

Q. Would you tell us about those times, please.

A. We pick up our groceries all the time. We pick up all of our groceries at the warehouse.

Q. Do I understand then, that Certified does not deliver groceries to you?

A. Not to us they don't. They just deliver frozen foods, delicatessen items.

Q. But your so-called dry grocery items, such as canned milk and cereals and things like that, do I understand that you pick those up yourself from Certified Grocers?

A. Yes.

Q. Do you know, Mr. McKernan, of your own knowledge whether the manager of a Von's or a Shopping Bag Store has to go to the warehouse himself in his own automobile or his own truck and pick up his groceries?

A. I don't know anything about that.

Q. Do you know whether Von's and Shopping Bag operate a large fleet of trucks?

A. Yes, I have seen them on the road, yes.

Mr. Knight: I wish to offer for identification this statement of Mr. Spencer L. McKernan as McKernan Exhibit No. 1.

(The document referred to was marked by the notary [fol. 976] public as McKernan Exhibit No. 1 for identification, a carbon copy of which is attached in lieu of the original.)

Mr. Knight: I have no further questions.

Redirect examination

By Mr. Vaughn:

Q. Do you have to go down to Certified to pick up your groceries?

A. No.

Q. They would deliver them, wouldn't they?

A. They would.

Q. In one of their own trucks?

A. Yes.

Q. Of which they have many?

A. Yes.

Q. Do you know whether Von's store manager ever runs short of a particular product and can't get it from Von's warehouse?

A. I don't know.

Q. You imagine that happens?

A. I imagine it happens.

Q. It happens frequently, doesn't it?

A. I wouldn't doubt it.

Q. By the way, looking over my notes here it appears [fol. 977] to me that the only stores that have come into your general trading area since you opened up are the Thriftimart and Von's or Shopping Bag, each of which is 13 blocks away; isn't that so?

A. The only—

Q. The only stores that have been opened up.

A. And the Cracker Barrel.

Q. And the Cracker Barrel, which was a few months or a year after you opened up; isn't that so?

A. Yes.

Q. In other words, when you went into that area it was already pretty well covered by grocery stores, wasn't it?

A. Yes.

Q. You knew you were getting into a highly competitive area, didn't you?

A. That's right.

Q. You thought you could succeed in that area, I take it?

A. Yes, sir.

Q. Have you?

A. Yes, sir.

Mr. Vaughn: I have no further questions.

[fol. 978] Recross-examination

By Mr. Knight:

Q. How long do you think this situation will last, that is how long you will continue in business based on the fact that your business has been showing a decline in the past few years?

A. I don't know.

Q. Do you anticipate that it will be a year?

A. I have no way of knowing.

Q. Counsel asked you, Mr. McKernan, and if I don't quote it correctly I can stand corrected, whether you have, and I think that is the word he used, whether you have to go to Certified to pick up your groceries. Do you recall that question?

A. No, we don't have to go.

Q. Would you explain that answer, please?

A. We go for the reason that we save a percentage off the cost by doing it ourselves. And we have our own trucks, why, we figure that we save money by doing it.

Q. Similarly, Mr. McKernan, based upon your extensive knowledge of the grocery industry wouldn't you say that Von's, the combined Von's and Shopping Bag, would save money by operating their own trucks?

A. Yes.

Mr. Knight: I have no further questions.

[fol. 979] Redirect examination.

By Mr. Vaughn:

Q. In other words, Von's has a trucking cost and you don't?

A. We have a trucking cost too.

Q. You use your own truck?

A. Still costs money.

Q. You think it costs less money than having one of the Certified trucks come out from the warehouse; isn't that so?

A. That's right.

Q. In many respects your overhead is lower than in a Von's Store, is it not?

A. That is hard to say. You mean volumewise?

Q. Do you have an advertising department?

A. No.

Q. Do you have a supervisor?

A. No.

Q. Wouldn't you say that Von's overhead is greater than yours?

A. In some respects. There are a lot of things. I am a supervisor.

Q. You do all those things.

A. Yes. I would say that the chains, not only Von's, have an advantage in their advertising, they have an ad- [fol. 980] vantage in their maintenance and they have an advantage in the amount of personnel that they hire. We get in a problem where, say, we can afford to have two men. We are not quite doing the volume that we should to pay their wages but what can we do about it? We can't get along with one. Where a big store has 30 or 40 men, and if their volume goes down, they cut off a couple.

Q. Do you think they can get along without that extra man?

A. Oh, yes.

Q. You are sure of that?

A. Yes.

Q. Do you have an accounting department and a personnel department?

A. No. I have an accountant.

Q. But you perform many of the functions for which Von's has to hire people?

A. Yes.

Q. You do all the buying, don't you?

A. Yes.

Q. You don't have to have——

A. I do all the buying of the produce.

Q. You do all the buying of the produce and others in your organization do the buying of the groceries?

A. Yes.

[fol. 981] Q. But you don't have a buying department for meat, for produce, for drugs, for groceries, for delicatessen or for bakery and the like, do you?

A. No.

Q. You don't have a warehouse to run?

A. No.

Q. To pay taxes; isn't that correct?

A. That's right.

Q. Do you really know whether your overhead is smaller or greater than Von's overhead at one of its stores?

A. No, I do not.

Mr. Vaughn: I have nothing further.

Recross-examination.

By Mr. Knight:

Q. I won't bother you after these two or three questions, Mr. McKernan.

Counsel mentioned advertising. Do you advertise in the Los Angeles Times?

A. No.

Q. Did you advertise in the now out of existence Los Angeles Mirror?

A. No.

Q. Do you advertise in the Herald Express?

A. No.

[fol. 982] Q. Do you know whether Von's and Shopping Bag advertises in any of those current two papers?

A. Yes.

Q. They do?

A. Yes.

Q. How many times a week, sir?
A. I think twice a week.

Mr. Knight: I have no further questions.

Redirect examination.

By Mr. Vaughn:

Q. Do you advertise in the local Glendale paper?
A. No.
Q. Why not?
A. We have tried it and it didn't help us any.

Mr. Vaughn: No further questions.

Mr. Knight: Mr. McKernan, would you agree to the transcription of your deposition without your signature? In other words, if counsel desires to file it in court would you waive signature and allow that to be done? Speaking for the Government, we will.

The Witness: Yes.

Mr. Vaughn: Counsel for the defendants will stipulate that you may waive your signature.

[fol. 983] TESTIMONY OF ERNEST A. MEKJIAN

If subpoenaed to testify, Ernest A. Mekjian would testify as follows:

1. He and his brother Mitchell are the owners of Food Bag Market, 11350 Victory Boulevard, North Hollywood, Los Angeles County, California. They have operated this grocery business for seven years. They lease out the meat department. Food Bag Market had sales of approximately $279,000 in 1960 in the grocery department alone.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which is customers are apt to read. Therefore, Mr. Mekjian closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. He sub-

scribes to the "Grocers Survey Guide," a booklet similar to the Key Services book, and follows the prices of all of the major chains appearing in those booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bulletin" and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the [fol. 984] witness would testify that in the period since he has been in the grocery business in the Los Angeles area the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that a single store operator cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the Los Angeles area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people that they did in the past. As a [fol. 985] result, fewer grocery stores are needed in the area to serve a comparable number of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses,

and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains.

7. He would also testify that he purchases from Certified Cooperative and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such major products as dairy, meat and produce items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution system. In addition, some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which [fol. 986] do not belong to Jersey Maid.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.3 per cent to 41.7 per cent; the market share of the 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

9. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a

history of successful growth and expansion. He would state that they were two of the largest chains in the area.

[fol. 987] 10. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their advertising is consolidated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same lines and the stores are known as "Von's & Shopping Bag."

12. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since he has been in the grocery business in the Los Angeles area. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

13. He would state that if this merger of Von's and Shopping Bag is permitted, there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution [fol. 988] throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer.

[fol. 989] DEPOSITION OF ERNEST A. MEKJIAN, taken on behalf of defendants, at 433 South Spring Street, Los Angeles, California, commencing at 9:30 A.M., Monday, April 22, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

ERNEST A. MEKJIAN, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Bates:

Q. Mr. Mekjian, you are a younger man than I expected to see here this morning. How old are you?

A. Thirty-six.

Q. Your brother, how old is he?

A. Forty.

Q. What is your present residence address?

A. 5050 Tujunga, Apartment 4, North Hollywood.

Q. Your brother's?

A. 17231 Gault, Van Nuys.

Q. Mr. Mekjian, in general the purpose of this proceeding this morning is to give me an opportunity to ask you questions concerning the statement that you have previously given the government. Do you have a copy of that statement with you?

A. Yes.

[fol. 990] Q. I wonder if you would lay it out on the desk and have it handy because I may refer to it from time to time.

In the statement you say that you and your brother Mitchell own the Food Bag Store at 11350 Victory Boulevard; is that correct?

A. Yes.

Q. Are you joint owners or a partnership, or what?

A. It's a partnership, joint.

Q. Describe that market to me, please, so far as size is concerned and its general appearance.

A. It is classified as a superette market. A two checkstand market which has an approximate size of 80 by 80

overall, including stockroom and office and selling space. It has baskets which customers get and go through the aisles and pick up merchandise. It is just like a superette market.

Q. How many checkstands do you have in the market?

A. Two checkstands.

Q. Do you have some car parking facilities attached to the market?

A. Yes. We have car parking behind the market.

Q. How many cars can you accommodate there?

A. At this present time, we just presently made an additional parking space and we can now accommodate approximately 30 to 35 cars.

Q. What was the size of the increase that you made?

[fol. 991] A. Approximately 15.

Q. 50 cars?

A. 15 cars.

Q. I understand that you and your brother just operate the grocery department and the produce department; is that correct?

A. At this present time, yes.

Q. Who operates the meat department?

A. Wallace Stokes.

Q. How long has he operated that meat department?

A. Since August of last year.

Q. 1962?

A. Yes.

Q. And prior to 1962 who operated the meat department?

A. We operated it from March 4th, I believe it was, to August of '62, and prior to that time we had it leased out to about four different parties.

Q. Is it fair to say it has been your general policy to lease that department whenever you are able to get a satisfactory tenant?

A. That is correct.

Q. Other than to operate it yourself.

A. That is right.

Q. What about the liquor department, is that under lease or do you operate it?

[fol. 992] A. We do not have liquor, we have beer and wine.

Q. What about that department?

A. That is ours.

Q. That is yours and you operate that?

A. Yes.

Q. My information is that you and your brother purchased the Food Bag Market from some people named Jouroyan.

A. Yes.

Q. And this was in January 1960; is that right?

A. That is correct.

Q. I also understand that you and your brother paid $9,000 plus the inventory costs for that market; is that substantially correct?

A. That is correct.

Q. Do you recall, Mr. Mekjian, how much inventory was there when you purchased it, in terms of dollars?

A. I believe approximately 13 to 14—I think it was thirteen five.

Q. Was it a going business when you took it over?

A. Yes.

Q. Did you change the name or retain the old name?

A. Retained the same name.

Q. Did you remodel the store in any respect after taking it over?

[fol. 993] A. Not basically constructionwise. We remodeled it by making new additions in fixtures, like 40 feet of frozen cases and 20 feet of produce cases, plus generally painted the inside of the store.

Q. How much did that additional investment amount to over what you paid the former owners?

A. Again approximately thirteen thousand for the fixtures alone.

Q. Then after remodeling the fixtures you and your brother had approximately $35,000 to $36,000 invested at that time, didn't you? That includes the inventory and what you paid these people.

A. At the initial inventory we began with, yes.

Q. You think that figure is, to the best of your recollection, correct?

A. I will have to figure it in my head. Thirteen and nine is twenty-two and fifteen would approximately be thirty-five thousand, yes.

Q. What do you consider the net worth of that business to be today?

A. I would have to think that over. It varied so much in the last few years. To me, if I was to sell it, I would have to get a certain price and I would say at this time it would be between 35 and $40,000.

Q. You say, "to me." Are you speaking you and your [fol. 994] brother or just your interest?

A. No, both of us together. This is, of course, based on the assumption that I would reduce my inventory to a certain point for selling.

Q. Now let us assume that you don't reduce it and sell it as it is today.

A. I would say closer to $40,000, right about $40,000.

Mr. Coyle: How much is your inventory worth today?

The Witness: Around $20,000, 21.

Mr. Bates: You and your brother Mitchell both work in the store?

A. Yes.

Q. You devote your full time?

A. Completely.

Q. In general what are your responsibilities?

A. Well, our responsibilities are joint, so telling you mine I will tell you my brother's as well.

We do everything from boxboy work to taking care of breakage to writing orders, to cashing checks, to setting up the ads, to doing everything that you would do from a boxboy and a janitor up to the owner, writing the checks, making out Certified. Over-all operation from the bottom up.

Q. How many hours a day do you and your brother work?

A. Well, the last few days I put in 14 hours each, [fol. 995] Sunday and Saturday. I would say the week would probably run between 65 and 80 hours.

Q. Sixty to eighty hours a week. That is for each of you now, isn't it?

A. That is for each of us. Between 60 and 80 would be a rougher figure.

Q. How many other employees do you have there at the store?

A. We have one other full-time employee who works forty-eight hours. And then we have part-time help.

Q. How about your check-out help?

A. That is part-time help.

Q. What has been your experience in the grocery business prior to purchasing this store in 1956, did you have any?

A. My father had a market up in Fresno about the start of the second world war.

Q. Did you work in that market?

A. Yes. I was rather young at the time but I did work there. Since that time I have gone to college for four years, UCLA, and of course all the time, summer vacation, I have been in the retail end of things, not necessarily the grocery business but the retail end of things, primarily clothing.

So upon graduation I went to work for Bullocks right [fol. 996] down here at 7th and Hill Street for six months.

Q. What year was that?

A. 1950. And after that I left there in six months and went to work for the J. C. Penney Company as a buyer and department head for five years prior to the time I came into the grocery business.

Q. Was that here in Los Angeles?

A. That was in Fresno.

Q. When did you first come to Los Angeles?

A. After J. C. Penney got me. I came to Los Angeles first many years ago.

Q. After J. C. Penney?

A. That was January of 1956 when I came in business here.

Q. Did your brother come here at the same time?

A. No. He was here at the same time, he was in the grocery business.

Q. Now tell me about your brother's experience. What experience did he have in the grocery business prior to your joint purchase of this store?

A. My brother had had about four or five years selling experience working for Lever Brothers and working for Personal Products, calling on various retail food stores in the Los Angeles area and for a very short period up in Fresno, when he was transferred up there. After leaving them he came to work for Thriftimart Markets for a period

[fol. 997] of three or four years prior to our opening up this store.

Q. He worked where for Thriftimart, here in Los Angeles?

A. Yes.

Q. In what capacity?

A. As a clerk initially and again, if my memory serves me right, he became assistant manager.

Q. Of some particular store?

A. Of some particular store.

Q. Do you know what store that was?

A. If I am not mistaken, again I believe it was the store on Rodeo Road and La Brea.

Q. Can you recall any other grocery experience he has had?

A. Myself?

Q. No, Mitchell.

A. Yes. For a while he was also working in the store that we presently own, off and on on Sundays, and on a part-time basis.

Q. He also went to college, didn't he?

A. Yes. He graduated from UCLA also.

Q. Was that prior to going to work for Thriftimart or after?

A. Prior.

[fol. 998] Q. Did you tell me how old Mitchell was?

A. Forty.

Q. He is older than you.

A. Yes.

Q. What do you consider your draw area to be in this particular store, so far as customers are concerned?

A. The basic draw, not including exceptions?

Q. Yes.

A. It would be an area approximately a half a mile to three-quarters of a mile square, starting from the central location of our store, or a square area around our store of a half a mile to three-quarters of a mile.

Q. How have you determined that to be a fact, Mr. Mekjian?

A. By the customers who come in and people we get to know and ask them where they come from, cashing checks.

Q. Could you express the percentage of your total cus-

tomers in relation to this area to 90 per cent of them or 95 per cent of them that come from this half to three-quarter mile area? Ten per cent, 99 per cent?

A. I would say, without knowing, a hundred per cent for sure, because I don't cash checks for all my customers that come in, that I would say this area would be about definitely 90 per cent of my business if not 95.

Q. You would characterize, would you, that anything [fol. 999] that comes beyond that draw area as being exceptional?

A. I would say it would be personal relationship or a passing by relationship. People that we got to know very well who moved out of the area or just people passing by.

Q. Within that draw area, which you just described to us, are there any other single or independent grocery stores?

A. There are three.

Q. Would you name them for me, please.

A. One is called the Country Boy Market, the other I believe is called the Dollar Saver, and there is another little market up there across from Safeway that I don't even know what the name of it is. It is right up there about half a mile from our store. And then there is a smaller store up on Oxnard, again I don't know what the name of that store is.

And I should say one thing in regard to this draw area. Our draw area has decreased in size with the opening of new markets, new supermarkets. Where our draw area was larger in '56 it is now smaller because of these openings.

Q. Now tell me of the Country Boy Store. Is that store comparable in size to yours?

A. Very comparable, possibly a little larger.

Q. When did they go into business?

A. They, at this present ownership, have been in busi- [fol. 1000] ness about two or three years, maybe four years. They have changed hands two or three times since we have been there.

Q. Has it always been in operation since you have been there?

A. Yes.

Q. But sold from one party to another?

A. Yes.

Q. What about the Dollar Saver, how does that compare in size with your operation?

A. It is smaller.

Q. How long has that been in operation, if you know?

A. Again it has changed hands several times and closed for a period of six months or so. I believe it has been in operation between six months and a year at this time.

Q. It was originally commenced between six months and a year ago?

A. No. The present ownership commenced. It commenced as a shopping area, I would say, four years ago, approximately again. I can't remember exactly what year, but about three or four years.

Q. These other stores, the one across from Safeway and the little store in Oxnard, are they comparable in size to your operation?

A. Quite a bit smaller.

Q. Have they been in operation all of the time since [fol. 1001] you have been there?

A. Yes.

Q. Now tell me about any chain operations that are in your present draw area.

A. Well, Safeway is about a half a mile down the street.

Q. When did they open?

A. They were there when we came in.

Q. Is that the only chain operation in your draw area?

A. No.

Q. What others?

A. Thriftimart has a store, I would say a half a mile away, and Dales has a store.

Q. Is that a supermarket?

A. Yes.

Q. Is that an independent operation or a chain?

A. It's a chain.

Q. These are all within your half to three-quarter mile draw area; is that right?

A. Dales is a mile. As I say, our shopping area decreased in size when they opened up.

Q. What others?

A. There is a new one opening up.

Q. What is that?

A. It is going to be called a Savco. It is going to be a

[fol. 1002] discount operation which will open up in about two months. They are not open but they will open in approximately two months from now I have been told.

Q. Which direction are they from your store?

A. Savco?

Q. Yes.

A. They are east.

Q. Are they on Victory?

A. Yes.

Q. These four chains, the only one that was in operation when you moved in was Safeway; is that correct?

A. Yes.

Q. And Thriftimart and Dales have come in since and Savco is about to open within the next couple of months.

A. That's correct.

May I say one thing? Prior to the time these various chains opened up directly about me there were chains further away and at that time the competition was two and a half miles away. In other words, it seems as they come closer the two and a half mile chain does not become as important as the one near-by, but it is still there and it is hard to measure how much it is hurting you.

Q. Then it would be fair to say that since you opened your store in 1956 that competition has greatly increased, hasn't it?

[fol. 1003] A. Definitely.

Q. Can you tell me, if you know, what stores from your draw area have closed up since you opened up in 1956, if any?

A. A store called Nero's, which changed hands, which was doing just about the same volume we were when we came in, and is, I would say, about a mile and a quarter from where we are, closed down. And I believe there was another independent market on Burbank Boulevard, between Vineland and Lankershim, which closed down. Whether it has re-opened again recently I don't know. And also during that period of time the Dollar Saver, which is now open, had cloosed down for a period of six months to a year and has re-opened again. I think at the time it initially opened it was called Time Saver and now I think it is Dollar Mart, or something like that.

Q. You don't know what happened to Nero's?

A. Well, it just closed down. He couldn't make it.

Q. Do you know the man?

A. I know the man who owned it initially.

Q. What was his name?

A. Nero.

Q. N-e-r-o?

A. Yes. However, he sold out to somebody else and it was the other party that closed down.

Q. Nero sold out and then the purchaser closed down [fol. 1004] after the purchase.

A. Yes. To the best of my knowledge I believe this is true.

Q. Do you know the purchaser?

A. I just would know by the name on the outside of the market whether he was the owner or not. The purchaser I don't know. It was called Fulgensi. And this, again, I believe is correct.

Q. But you didn't know the man personally?

A. No, not know him. I had gone in the market before, I had seen him, but I didn't know him.

Q. You didn't know anything about his background or his experience as a grocer?

A. Nothing.

Q. You had no information as to how well or how poorly he may have been capitalized when he opened the store or purchased it? You have no information about that?

A. I have nothing about his background.

Q. I would like to have you comment further upon your statement to the effect that as the number of stores and chains increased that your draw area became restricted. Is it your opinion that in 1956 when you opened that you had a draw area of about two and a half miles?

A. I would say between a mile and a half to two miles.

Q. A mile and a half to two miles?

[fol. 1005] A. Yes. It would vary. The basic area was between a mile and a half and two miles.

Q. And the new stores that came in and opened up, that caused the restriction of your draw area, were those chains or single stores or both?

A. They were primarily chains, all chains.

Q. They were all chains?

A. Yes.

Q. And all of these chains, with the exception of Thriftimart and Dales, were in excess of a mile away from your store, were they not?

A. The ones that opened up?

Q. Yes.

A. Yes.

Q. Then it is your opinion that the increase in the number of stores that opened up there has likewise materially increased your competition?

A. Definitely.

Q. Mr. Mekjian, when you opened up in 1956 what was the volume of your business? That is for the year 1956.

A. For the year of '56?

Q. Yes.

A. I have to use my figures here for a second because it varies so much.

Without having my exact figures in front of me I would [fol. 1006] have to say around $240,000 to $245,000, in that area. I could be off a little bit one way or the other but not too much.

Q. The business increased in 1957, didn't it?

A. Yes.

Q. How much?

A. I would say at least $30,000.

Q. That would make it $275,000?

A. I would say right about there.

Q. How about 1958?

A. '58 was a good year.

Q. It was a good year?

A. Yes. I would say it was close to $300,000.

Q. 1959?

A. It was—It is awful hard to be exact because I don't have the figures in front of me.

Q. I am just asking for your best recollection, Mr. Mekjian. I understand without the figures you can't be exact. Just approximate it as nearly as you can.

A. I would say in that same neighborhood.

Q. 1960?

A. I do know this, that after about '58 our income has dropped down each year. So I imagine '60, '61 and '62 our volume dropped accordingly. And if I was to say exact

figures I think we are right around $300,000 in '58 and '59; [fol. 1007] is that correct?

Q. Yes.

A. I would say we dropped down $10,000-$15,000, right along through that period.

Q. 1960 was $280,000 would be your reasonable approximation?

A. What year did the strike take place?

Q. '59.

a. Well, '59, of course, was our good year. '60 definitely dropped down and '61 dropped below '60 and '62 was our worst year volumewise from the grocery and produce operation and all. But because we were forced to take over the meats, because of the poor production there, our over-all volume was higher because we had meats in our total volume for that period of time for a matter of six months.

Q. Then during 1962 what would you say your over-all volume was?

A. Including meats?

Q. Well, yes, if you were operating it.

A. For six months it was close to $290,000.

Q. 1962?

A. Yes.

Mr. Coyle: Why don't we get it without the meat too so we will all be together here.

Mr. Bates: Q. What would it be without meat?

[fol. 1008] A. Between two fifty and two sixty, two sixty-five, some place right around there.

Q. I don't believe you gave me a figure for 1961. What is your recollection?

A. It must have been about two seventy-five, two eighty.

Q. Do you attribute this loss of volume to the increase in competition caused by the other markets that have come in and surrounded you?

A. Definitely.

Q. Mr. Mekjian, have you made any study of your draw area in the general area where your store is located concerning population and whether it has increased or decreased?

A. Oh, the population has increased.

Q. What increase in population have you experienced in your draw area between 1956 and the present time?

A. New apartments going up.

Q. What?

A. New apartments have gone up.

Q. Have there been other housing developments in and around your area that contribute to your draw?

A. Not too much in the way of new homes, no.

Q. Other than the area a mile around your draw area, for instance, where the new stores have moved in, has the [fol. 1009] population increased out there?

A. If you are speaking of the West Valley, which is maybe ten miles from me, that is the area which has grown.

Q. As a matter of fact it has grown all over the Valley, hasn't it, considerably, since you and your brother came down from Fresno and moved down there?

A. Just fantastic growth. Out in the West Valley primarily.

Q. Is it fair to say that the study that you have undertaken concerning marketing conditions has been largely, if not entirely, confined to your own area out there?

A. Definitely not.

Q. Not?

A. Not.

Q. Have you made a study of the marketing conditions down in Orange County?

A. Would Covina be in Orange County?

Q. No.

A. I would say I have not made an extensive study of Orange County but I have been aware of what has been going on out there on the expansion program from salesmen. Primarily from word of mouth, not my own study.

Q. What about the Santa Monica area?

A. There again I have gone by various stores in that area. I have one of my part-time helpers working in one [fol. 1010] of the chain stores there and I have talked with him and I have checked competition in various of those markets and I have gone by and stopped in and seen what the pricing setup was.

Q. What about the Long Beach area?

A. Very remote. There again just through word of mouth what salesmen tell me.

Q. This downtown area, have you made any study of that?

A. Here again I would say that is the same kind of a study, the general study without an exclusive study.

Q. What about the Covina area? Did you make a study of that particular area?

A. I was going to look into a market out there so I studied it pretty extensively.

Q. In general what have you studied? Suppose you tell us what you have read in the way of trade journals or statistical information.

A. There again what I have read has been bulletins coming in to me. The Commercial Bulletin, which comes in once a week, and we get the Progressive Grocer in, and we get various periodicals and articles that are sent in once every so often.

Q. And you just customarily read the trade journals and the articles of common interest to all grocery men, don't you?

[fol. 1011] A. Yes, I glance over it and if it catches my eye I read it.

Q. Aside from reading the trade journals, the articles that are of common interest to all grocery men, you have made no particular study of any area save and except the trade area in which your store is located; isn't that true?

A. I would say primarily my study has been stopping in at various markets and looking at the stores. This is where you learn most, I believe, is in watching displays, checking pricing, checking merchandising techniques. I think you can sometimes learn more this way than you can by being——

Q. In other words, you go out and do this checking in order to get your competitors to contribute to your education.

A. I feel that in checking an area in Long Beach or Santa Monica it is important from the over-all merchandising aspect as it is from just checking your immediate competition in your immediate neighborhood. You might learn something out there which they don't have out here.

Q. That is a common practice of all grocery men, isn't it, to visit each other's stores and seeing what they are doing?

A. I would presume so. I do it.

Q. And in addition to that you subscribe to a little Black book, or some kind of a trade journal, that gives you [fol. 1012] the prices——

A. Grocery Survey Guide is what we use.

Q. You have the Grocery Survey Guide?

A. Yes.

Q. And you regulate your prices by that Grocery Survey Guide?

A. To a very great extent.

Q. You don't consider yourself to be in competition with any store down in Anaheim, for instance, do you?

A. I do not.

Q. Or Long Beach?

A. I would say I am in a broad sense of the word. When a store in Anaheim or a store in Long Beach may set a price pattern that would affect my chain stores in my immediate surrounding area it does definitely affect me indirectly and does directly. If the stores in Anaheim are affecting my chain competition near-by.

Q. Have you ever had a store in Anaheim or Santa Monica set a price that affected prices in your store that you know of?

A. If such a store might be one of the chains, which over-all changes its price patterns to 50 stores throughout the County, then I would say it would be in Anaheim and Long Beach and all over, and plus near-by. Because they usually change the price in all 50 stores at one time.

[fol. 1013] Q. Aside from the broad pattern in which the prices are affected, isn't it true, though, that you consider your competition only those stores in your area that are taking customers that might come to your store?

A. Yes.

Q. Mr. Mekjian, you are a member of Certified, aren't you?

A. Yes.

Q. Have you been a member of Certified ever since you opened your store?

A. Yes.

Q. As a member of Certified you are one of the owners of Certified, aren't you?

A. That's correct.

Q. Certified owns their own warehouse, don't they?

A. That is correct.

Q. And they own a very extensive fleet of trucks, do they not?

A. Yes, they do. They own two warehouses, one in the San Fernando Valley as well. It's on Eastern Avenue.

Q. And you know, do you not, that Certified buys direct from producers?

A. Yes.

Q. And they have railroad and truck lines ship in and store in their warehouse?

[fol. 1014] A. That's right.

Q. From these warehouses they use their fleet of trucks to serve your store?

A. Yes.

Q. You send your orders in and they make their shipments promptly, don't they?

A. Yes.

Q. In your statement you say that the chain who owns its own warehouse and owns its own fleet of trucks, buys direct from producers, by reason of that fact have an advantage over single store operators. What advantages do they have over single store operators that belong to Certified, in that respect?

A. That is an advantage over having direct shipment from Certified

Q. If you will refer to your statement you will see that you stated——

Mr. Coyle: Which paragraph, Mr. Bates?

The Witness: Is that Page 2, Paragraph 6?

Mr. Bates: Q. It will be Page 2, Paragraph 6.

Mr. Coyle: Perhaps 7, too?

Mr. Bates: Q. You will notice, Mr. Mekjian, that you attribute advantages to chain stores by virtue of their ownership of the warehouse, fleet of trucks and ability to buy from the producers. You have also told me that as a mem-[fol. 1015] ber and owner of Certified that you likewise have warehouses, fleets of trucks and ability to purchase direct from producers. What part of these advantages that you refer to are different than the ones that you have as an owner of Certified?

A. I would say that the primary advantage is in the saving of expense.

Q. What is the basis of your statement?

A. The basis for this opinion is that whenever a chain store can operate and pick up its merchandise from Certified in its own fleet of trucks, like you take Dales, you take some of the other markets that also operate the same way, who have got six or seven stores, they invariably take on the added expense which includes the insurance, the hiring of personnel and all these various factors, because they feel, and they must know, that in so doing they are saving expenses of the over-all operation right throughout the year, because otherwise they would not do it.

Q. That is just a conclusion and speculation on your part, isn't it?

A. It is. And yet it is based upon the fact that I have spoken to various drivers and people and I believe that Certified charges you so much per delivery of merchandise. In fact I know they do, they have to.

Q. You know, don't you, that a chain operator who owns [fol. 1016] these trucks has a capital investment in those trucks; is that correct?

A. Very true.

Q. And he hires a union driver to drive it, doesn't he?

A. Yes, he does.

Q. And he buys gasoline and tires and all kinds of repairs?

A. Yes, he does.

Q. Just the same extent that Certified does; isn't that true? Do you think his cost of operations are any less than Certified's?

A. For some reason they must be. There must be some hidden advantage otherwise stores would not do such.

One advantage would be the fact that they can have a truck pick up merchandise any time they so desire. They have immediate delivery. But there must be a saving or else they wouldn't incur them.

Q. That is just a guess on your part?

A. It is a definite opinion, it is not a guess.

Q. And that is the only reason you say that they have an advantage is that they must save expenses; is that right?

A. Along with the advantages that come in having your own trucks that you can transfer things from store to store.

Q. Well, a single store operator doesn't need any such service as that because he only has one store and he calls [fol. 1017] Certified and says, "Drop off this list of merchandise," and that's it. You don't have any transfer problem, do you?

A. Well, I have a problem if I have something on an ad and it doesn't sell. I have 25 cases or 50 cases left over and a chain can transfer it to another store.

Q. Other than saving in the expense of operation, which you say is your opinion——

A. There must also be a saving in the purchasing too. I don't know what it is, I am not that big to know. So it must be a dual setup, in the distribution and also in the purchasing. There must be some saving when you put them together. Because whenever this situation occurs and a store gets big enough they automatically do this. And at the same time they retain their membership in Certified Grocers. So that if by chance they run out of something that Certified may still have at a lower purchase price they have a dual capacity to go in to Certified, pull this low cost merchandise out. So they have it from both angles.

Q. Is it your opinion as an experienced grocery man that a chain operation can buy from the producer cheaper than Certified?

A. This is something that I never had the opportunity to experience. I am not that big to know. I don't know the hidden things that go on in the grocery business, and there are a lot of hidden things. I just have that opinion.

[fol. 1018] Q. In other words, you are saying to me that you don't have any facts upon which to base the opinion; isn't that correct?

A. In regard to why they pull out and have their own trucking?

Q. No, no. As to whether they can buy cheaper from the producer than Certified.

A. I would say I have no facts at all. I would say they shouldn't. Because Certified buys in huge volume and should be able to purchase equally as economically. No facts at all.

Mr. Coyle: You do know that you have to pay a service charge to Certified that they don't have to pay?

The Witness: Yes, I do. Because during the strike, another thing——

Mr. Bates: Just a minute, please.

I object to government counsel putting questions to the witness during my interrogation. I am not finished yet and you will have your opportunity, Mr. Coyle.

Mr. Coyle: I didn't want to have to come back to it. I thought it would be nice to have it all together on direct.

Mr. Bates: I don't want to conduct this deposition in that fashion, Mr. Coyle. I want to ask my questions and complete them and then you ask yours.

Mr. Coyle: You go ahead and ask your questions, Mr. [fol. 1019] Bates.

Mr. Bates: Q. Mr. Mekjian, have you ever had occasion to make an investigation or an independent study of the market shares of the different chain operations in Los Angeles County?

A. Never on my own, no.

Q. You wouldn't know then what Safeway's market share would be, would you?

A. I would approximate what their market share would be from——

Q. What is it?

A. I believe it is ten per cent. This is what I was told a few years ago. Again, this is what you hear in the conversations in the grocery business, people coming in and out.

Q. What would the market share of Ralphs be? Do you have any information on that?

A. Here again through the same source I heard it was around eight per cent.

Q. What about Von's-Shopping Bag?

A. I believe it is ten per cent or better.

Q. Ten per cent or better of the total——

A. It is right about the same that Safeway has, I believe, at this point. Again, I am saying these without knowing for sure. This is what I have heard.

[fol. 1020] Q. Do you recall who told you that Von's-Shopping Bag had ten per cent of the market share of groceries in Los Angeles and Orange Counties?

A. No. Again it was through this general conversation setup that takes place when salesmen come in and various people come in, Certified possibly may have talked to me. I have talked to Certified, contacted them many times.

Q. Mr. Mekjian, counsel in this proceeding refer to the metropolitan area of Los Angeles as being Los Angeles and Orange Counties. Are you aware of that?

A. I believe that was true, they include Orange County in the general metropolitan area.

Q. Yes.

A. Yes.

Q. And when I use the phrase "metropolitan area" I am referring in that sense——

A. Orange County included.

Q. Do you know how many single or independent store operations there are in the metropolitan area of Los Angeles?

A. I do not.

Q. Do you know what the market share of the total number of single and independent grocers is in the metropolitan area of Los Angeles?

A. Are you speaking of single stores? You are speaking of one store or less?

[fol. 1021] Q. I am speaking of all of them together, what the aggregate market share of all single store operators would be in the metropolitan area. You have never seen any statistics on that, never discussed it with anybody?

A. I believe that the government counsel showed me some figures as to the general number of percentages that these stores were doing. The only question in my mind that arises is when you speak of single stores, there are many stores that are not classified as chains that may have two store.

Q. How do you classify a chain operation?

A. I believe a chain store is three or more, according to my books in colleges many years ago but I believe it is.

Q. Of course you do not classify a two-store operation as being a single or independent, do you?

A. I don't know if that is what you meant, a two-store operation being a single. I would say a two-store operation would not be considered a chain.

Q. Then I will ask you this question. Do you know how many two-store operations are in business in the metropolitan area of Los Angeles?

A. No. I know of one around my area which is very strong.

Q. Then the only information that you have with reference to the market share of chains or independents is that [fol. 1022] shown to you on the chart exhibited to you by the government; is that right?

Mr. Coyle: He has already testified that he has other information, Mr. Bates.

The Witness: I go based upon the information the government counsel showed me and again the general conversational drift that comes through the store and talking with Certified men, salesmen.

Mr. Bates: Q. Perhaps I didn't make myself clear, Mr. Mekjian. You have told us about the general information which you have assembled in reading trade journals.

A. Yes.

Q. I am asking you now if you have ever seen any other chart or graph showing the market shares other than that exhibited to you by the government.

A. No.

Q. Did you ever try to get into a shopping center?

A. One on a smaller scale, very small.

Q. Where was this?

A. This was on the corner of Lindley and Saticoy. I believe that is Reseda. In fact I know it is Reseda. I wasn't sure whether it was Van Nuys or Reseda, but it is Reseda.

Q. What is the name of that shopping center?

A. I don't know what the name is now.

[fol. 1023] Q. Do you remember who you contacted?

A. Well, at that time it was being built. We were talking with the owner by the name of Forester.

Q. What efforts did you make to get in?

A. Well, let's say we had an opportunity to get in but we turned it down. Other than that, as far as getting into large shopping centers, no.

Q. Where is the closest Von's or Shopping Bag Store to your operation?

A. The closest one would be about equal distance, I be-

lieve, from either side. One is on Riverside Drive right about Fulton and Coldwater, in that area, and the other one is a Shopping Bag location which is again on Foothill Boulevard, I believe, in that area out that way.

Q. How far would the Shopping Bag Store be from you?

A. I would say about two and a half to three miles, either way.

Q. How far would the Von's Store be on Fulton?

A. I would say they are both in the area of between three and five miles. As I say, I haven't tried to measure them exactly. In that area, three to five miles.

Q. Were those stores both in operation prior to March of 1960?

A. I know the Shopping Bag was. I don't know if the Von's opened up after. I believe they may have opened up [fol. 1024] after but I am not sure.

Q. They are beyond your draw area, both of them?

A. The basic draw area, yes.

Q. Being beyond your basic draw area you don't consider either of those stores as being competitors, do you, to the customers you serve?

A. Again I would have to repeat myself and say they would affect me only in how they indirectly affect my direct competition. If they affect my direct competition they affect me. They don't basically in the same area drawwise, no. Even though both those stores do tremendous volume, I don't know how much they draw from. Two of the biggest stores in the whole chain, I believe.

Q. You have no recollection when the Von's Store opened up?

A. No, I don't know. I think it was opened after I got there, but again I can't pinpoint it.

Q. In relation to the Von's-Shopping Bag merger, which I will state for your information was in March of 1960, when did that store open up, prior to March 1960?

A. I can't tell you, Mr. Bates. I don't know exactly.

Q. You just don't recall. I think you state in your statement here that the merger between Von's and Shopping Bag will accentuate the larger chains' advantages.

Mr. Coyle: Which paragraph is that in, Mr. Bates?

[fol. 1025] Mr. Bates: It is Paragraph 13. The last sentence in that paragraph.

Mr. Coyle: You mean the sentence that reads: "This merger is a major stride in increasing the market share of the larger chains and it will accentuate the larger chains' advantages over the small grocer"?

Mr. Bates: That is the sentence.

Q. What is your basis for making the statement that this merger will accentuate the large chains' advantages?

A. My opinion on that is that if this trend of mergers continues it will eliminate the number of chains within the area by creating more mergers, and thus create the image that over-all size is by far the most important aspect why a customer should shop in an area. The size factor is an important psychological factor, even if the price of the product is identical on the shelf, as in a can of Del Monte, whether it is on my shelf or somebody else's shelf. But the psychological factor of size means an awful lot. I have found that to be true.

Q. This merger between Von's and Shopping Bag gave no advantage to Safeway, did it?

A. Advantage to Safeway?

Q. Yes.

A. I don't see how it could have.

Q. It didn't give any advantage to Ralphs, did it?

[fol. 1026] A. If it did I sure can't see why it did.

Q. Or to Thriftimart or to A & P? As a matter of fact, this merger gave no advantage to any chain with the possible exception of Von's and Shopping Bag; isn't that right?

A. Yes.

Q. Now will you tell me, please, what advantages you refer to in Paragraph 13?

A. The one I told you just a few minutes ago. Not that —I would say that—Let's see. It possibly created the image of chain acceptance to the customer more so than ever before, because I do know that the chain image is very important in the customer's mind.

Q. Didn't Von's have this image prior to the merger as a large chain operation in the area?

A. Maybe I am off on a tangent here, Mr. Bates. But is

your question how did this increase the overall setup for all the chains or just for Von's and Shopping Bag?

Q. Well, you stated to me that these advantages which you referred to in Paragraph 13 were no advantage to other chains except Von's and Shopping Bag; isn't that true?

A. As far as the chains are concerned, yes, they would have no advantage as to any other chains except Von's and Shopping Bag. But the merger may have created the image of more ready chain acceptance by the consumer because of this merger. It just created the whole chain image, not [fol. 1027] just Von's and Shopping Bag.

Q. Didn't Von's have that image prior to the merger?

A. Yes, they had it to a great extent, yes.

Q. Didn't Shopping Bag have that image prior to the merger?

A. Yes.

Q. Then please explain to me what advantage or additional advantage in that respect, that is the image of acceptance, was received by Von's-Shopping Bag after the merger.

A. I would say merger made it even stronger to the consumer.

Q. Aside from your description of this psychological image of acceptance in the customer's mind as being the advantage you refer to in Paragraph 13, can you think of any other advantages that were received by Von's-Shopping Bag as a result of the merger?

A. I would say that it created a situation where they can economize on many expenses that they were both doing simultaneously against each other when they were separate. Advertising being one. I would say it helped in the seeking of locations, it created a lessening of competition between a few stores for a particular site. They also would help in distribution. I believe it helped them quite a bit in the bakery aspect. If I am not mistaken, this again I believe Shopping Bag has a bakery of its own, and this bak- [fol. 1028] ery now could take care of both operations rather than just the one. And this was a very important factor for the merger, just the bakery aspect alone.

Then administration expenses, buying strength, personnelwise. All these little things could have entered into it.

Q. As a single store operator you do everything you can in your business judgment to reduce your expenses, don't you?

A. Yes.

Q. And you do everything you can in your good business judgment to increase the volume of your sales, don't you?

A. Increase the volume of sales? Yes.

Q. And you do everything that you can in your good business judgment to increase your net profits in that operation, do you not?

A. Yes.

Q. Now, you refer to the advantages the large chains will have over the small grocer. How does the large chain get an advantage over the small grocer through this merger that results in decreasing their expenses of operation?

Mr. Coyle: He just answered that. I object to that on the ground that he just answered the question, Mr. Bates.

The Witness: I believe I did answer that, did I not?

[fol. 1029] Mr. Bates: Q. I don't think you did. But answer it again. The objection will be noted.

Mr. Coyle: Can we read back the answer to the previous question.

(The reporter read the record commencing on Page 39, Line 24 to and including Page 40, Line 17.)

Mr. Knight: Isn't that the answer to the question you asked?

Mr. Bates: Let me strike the question that I asked and rephrase it.

Q. You have stated to us, Mr. Mekjian, that you do everything as a single store operator that you can to reduce your expenses, and you have stated that in your opinion that this merger will result in the Von's-Shopping Bag reducing their expenses. Now will you tell me in what manner the reduction in expenses by Von's-Shopping Bag, which you say resulted from the merger, is an advantage over the smaller grocer.

A. How the reductions of these savings are an advantage over the small grocer?

Q. Yes.

A. Well, if any operation can reduce its expenses they have created a setup where they can operate at lower expenses and thus operate on lower margin. Thus they can discount merchandise at an easier rate and still make the [fol. 1030] same rate of profit.

Q. That is exactly what you would do, isn't it?

A. I do exactly what the chains do, Mr. Bates, to a great extent. because the pricing setup is set up by them. I don't set the price, they set it for me. If they set the price of sugar at 20 cents a pound, if I want to keep my competition I go for 20 cents a pound. In other words, I have to follow them. I can't set my own pattern, except on little things such as I have a choice of putting a particular item where I want it on the shelf and other things in my judgment. But as far as pricing goes and procedures, and giveaways, if they continue it and it created a competitive setup I have to follow them or else go out of business or cut my volume, either one.

Q. Then you are saying that one of the advantages resulting from this merger is the ability of the chains to fix prices which you must follow?

A. This would be a very big advantage.

Q. Didn't the chains have that advantage before the merger?

A. Yes.

Q. Then the merger had nothing to do with it in your opinion; isn't that so?

A. Only in the sense that it would have an advantage that a bigger group of stores would be changing the price [fol. 1031] now instead of just one set. In other words, two sets of stores if they go on the pricing setup would make you follow than one set of stores. In other words, before there had been a general relationship if the store you follow was Safeway, or you follow Ralphs, or you follow Von's and Shopping Bag. And I would say the more strength you have within an area the quicker you can set the pricing patterns and other stores have to follow.

Mr. Bates: That is all.

(A short recess was taken.)

Cross-examination.

By Mr. Coyle:

Q. You mentioned a draw area of one and a half to three-quarters of a mile. Is that one and a half to three-quarters of a mile in each direction from your store?

A. We draw from prior to where the chains come in. You say one-half to three quarters.

Q. One-half to three-quarters.

A. Oh, yes, at the present time.

Q. That would be in every direction?

A. Yes.

Q. Prior to the time the chains came in your draw area was larger you testified.

A. Yes.

Mr. Vaughn: Do you say one and a half?

[fol. 1032] Mr. Coyle: It is now one-half to three-quarters of a mile. And when he says "square," it is really a radius.

Mr. Vaughn: I thought you said one and a half.

Mr. Coyle: Q. You say as the chains opened around your store the draw area of your store lessened from about one and a half miles to three-quarters of a mile, or something approximately like that?

A. To the present, yes.

Q. Are there chains outside your draw area which are drawing customers out of your area?

A. I am sure there is.

Q. It is your experience, in your opinion, that the chains have a much larger draw area than your store?

A. Yes.

Q. Do the Von's and Shopping Bag Stores draw customers from within your area?

A. I don't know if they do or not. I presume they do. The thing that you have to remember in this draw area setup is that with the number of stores that have opened up throughout the whole Valley and throughout the whole area, you may have a customer who is calling on you at your location who now finds it more economical—not economical, more easily or more feasible to step somewhere along the line because of the numerous stores that have

opened up throughout the whole area. So it is kind of hard to measure exactly.

[fol. 1033] Von's and Shopping Bag might be one of those markets.

Q. I believe you stated that you have to pay a service charge to buy from Certified and then were going to relate something that happened during this strike. Could you tell us what you were going to relate?

A. There was a time when we had to get some extra merchandise in our store and we sent our produce man down to pick up the merchandise for us. And so our bill from Certified was lower because of the fact that we picked it up down at the warehouse. I just forget the exact percentage. I could find out by calling up Certified.

Q. I think it is on the record, anyhow, from other witnesses. You also testified, I think, that if a store down in Anaheim institutes a promotional device or a price change that would cause the chains to retaliate, and as a result that store would have a competitive effect on your operation.

A. If it became area-wide, yes.

Mr. Coyle: I have no more questions.

Redirect examination.

By Mr. Vaughn:

Q. You stated in your testimony, Mr. Mekjian, that there is a two-store operation near you which is very strong. Am I correct?

[fol. 1034] A. It is one of the cleanest and best operations in the whole city.

Q. That is Gelson's, isn't it?

A. Yes.

Q. They have a store in North Hollywood?

A. In Burbank.

Q. That's right. I beg your pardon. About how far away from you is that?

A. I would say about two and a half-three miles.

Q. And a store in Encino which is farther away from you; isn't that right?

A. Yes.

Q. And those stores are very large supermarkets, are they not?

A. I would say they are more successful than they are large. But they are large and represent supermarkets, yes.

Q. You know Gelson's is also owned and operated by two brothers; isn't that correct?

A. I know.

Q. And they started in business when, can you tell me?

A. Without being a hundred per cent sure, I think they started about 20 years ago or so. That is what I have heard.

Q. If I were to tell you that the two brothers who now operate this present business started in 1948, that would be approximately correct, would it not?

[fol. 1035] A. If this was exactly right I would say yes. I wouldn't know for sure.

Q. You don't know for sure?

A. No.

Q. Do you know in what sort of a store they started?

A. Here again the rumors go about that they started in a smaller store.

Q. About 700 square feet, wasn't it?

A. So I have been told.

Mr. Coyle: This is all conjecture as to this witness.

Mr. Vaughn: Are you testifying that it is conjecture, Mr. Coyle?

Mr. Coyle: He is testifying that it was conjecture.

Mr. Vaughn: If you want to establish it was conjecture why don't you ask the question?

Mr. Coyle: He hasn't been in the area that long.

Mr. Vaughn: Q. You have heard that they started with a 700 square foot store; isn't that right?

Mr. Coyle: You are saying that.

Mr. Knight: It is clearly hearsay.

Mr. Vaughn: Q. You have heard that, haven't you?

A. I have heard they started in a smaller store. As to the exact size I don't know.

Q. You have been in the Gelson's Store in Burbank?

A. In both stores.

[fol. 1036] Q. They are tremendously successful market operators, are they not?

A. Yes.

Q. What would you say was the reason for their success?

A. Well, for years Gelson's have been known primarily for their produce. They have a very unique pricing setup which was psychologically very strong.

Q. How is that?

A. Well, as every other store advertises C & H Sugar at 49 cents, or Folgers Coffee at 59 cents, or 49 cents, whatever the price was in that particular era, Gelson's was advertising institutional ads and "Come and See Us, Low Prices Every Day." And what they did in their store, they picked maybe 20 key items, or whatever the quantity was, and discounted the prices on the shelves prior to the discount era which began some years back. And they would stack big items of Best Foods Mayonnaise, if the going price was 69 they would stack it at 59 cents, which would be just about cost price, or something like that. So they created a very unique setup in merchandising, which proved extremely successful with the over-all cleanliness and the way they keep their store merchandised, it is just beautiful. They do not economize at any point. Whether it be personnelwise, relationshipwise with the customers, in any respect. They are just smooth operators.

[fol. 1037] Q. They have almost a hospital-like atmosphere in their cleanliness.

A. They seem to have a beautiful setup. I haven't gone in there all the time but people tell me how much they like them.

Q. They have wider aisles than most grocery stores, do they not?

A. I do not know.

Q. They have their merchandise always stacked very neatly, do they not?

A. Very clean store throughout.

Q. They provide little extra personal services for the customer, do they not?

A. From what I have been told, yes.

Q. And on the whole their prices are a little higher than the going rate, are they not?

A. No.

Q. You are able to say that without any fear of contradiction, I take it?

A. Unless they have recently changed their whole pricing structure I would say they are very much in line pricewise. And I haven't been in one of their stores recently, for two months or so. But they are very competitive.

Q. This is an example of starting out as a small opera-[fol. 1038] tion which has been very successful, is it not?

A. This happened, fortunately for them, when the acceleration of chain expansion didn't kill you off so fast.

Q. There are other examples of successful single store operators who have had successful and expanding businesses in the Los Angeles area, are there not?

A. Oh, I am sure there is. I would venture to guess, though, that most of these operations that have grown to any consequent size were created and established and maintained prior.

Q. Prior to what?

A. Prior to this tremendous competitive situation which has occurred in the last few years.

Q. When did this begin? What period of time?

A. It has always been extremely competitive, no matter from the very beginning of the modern era, '52, '53, years ago, competition has been keen in every field throughout the world. But I would say this fear of expansion—Now, I can remember vividly in my mind the desire to expand. This was when we first came in business. We were doing pretty well in '57 and '58 and then again I can't pinpoint the exact time, but there came a period when chain stores were opening up on every other corner, it seemed like service stations. And the whole idea of expansion just seemed to wither away. And all you were concerned about was [fol. 1039] maintaining a profitable operation. Because not only does your volume decrease and the desire to get new sites decreases because of this tremendous competitive location site grasping by all the chains, but your gross volume also—I mean your percentage of mark-up, your gross margin seemed to have a decline. And plus the discount operations coming in, your Blue Chip stamps, you got into a setup where you just didn't know if you were making money.

Q. The discount house sale of food is a relatively new

method of merchandising, isn't it, in the Los Angeles metropolitan area?

A. As far as I am concerned, yes.

Q. In about the last three years discount houses have started to sell food?

A. Yes. Blue Chips took a cent and a half away from you too.

Q. This Savco that is going in near you, that is a discount house, is it not?

A. Yes.

Q. Who is operating the grocery department in that store, if you know?

A. From what I have been told nobody seems to know definitely for sure. It is going to be Fox or Food Fair.

Q. Food Fair is going to do so?

A. Either one. I think they are the same outfit.

[fol. 1040] Q. Fox is bankrupt, is it not?

A. Don't they operate by their name yet?

Q. There are Fox Stores but the Fox Company is bankrupt, is it not?

A. Yes.

Q. You know that. And do you know the reason why they went bankrupt?

A. Well, the basic accounting setup was that their liabilities were larger than their assets.

Q. You read in the trade papers and in the court of your study of the grocery business that they went into bankruptcy because they expanded too rapidly with inadequate capital?

A. This might be one of the reasons but I would say there is another reason. They were basing their expansion, which was successful for a long time, on the premise that there was a rising market. And the rising market became competitive, like I mentioned here, and so their volume dropped and their profits dropped. And I think if the setup had maintained itself like it had for many years, where no matter what you touched turned to gold, and competition wasn't so keen. But competition reversed itself.

Q. Competition got tougher?

A. Definitely.

Q. A chain store that finds itself with an increasing

number of competitors by reason of new openings experiences a reduction in draw area too, doesn't it?

[fol. 1041] A. I would presume so, yes.

Q. I take it that the store——

Mr. Coyle: Did you have something to add to that previous answer?

The Witness: I was going to say if their draw area doesn't decline their volume does.

Mr. Vaughn: Q. I take it that it is the opening of this Dales Market near you which affected your business more than any other opening; isn't that so?

A. Prior to the opening of Dales.

Q. Didn't the opening of Dales affect your business more than any other opening since you have been in business?

A. No. Dales affected us a lot but Thriftimart hurt us the most.

Q. How many stores are operated under the name Dales, do you know?

A. They operate two types of chains. They operate a supermarket and they operate a Dales Junior. And I think that—I don't know, I imagine maybe it is ten, twelve, something like that.

Q. Does Dales have its own warehouse?

A. No. They pull from Certified but they have their own fleet of trucks, I believe.

Q. You said in response to questions by Mr. Bates that [fol. 1042] you conclude that the chains must have an advantage by warehousing, doing their own warehousing, or they wouldn't do it. Isn't that essentially what you said?

A. Yes.

Q. You don't have any specific figures, you don't know whether a chain owns its groceries, if we can use that phrase, on its shelves at a price lower than that that can be obtained from Certified? You don't have any specific figures in mind?

A. No.

Q. And you don't know that they own their groceries cheaper than the independent operator, do you?

A. No.

Q. As a matter of fact, wouldn't you imagine that your

overhead in your store is less than the per unit overhead of Von's, for example?

A. I don't know. Because I don't know what they operate at percentagewise. I would try and operate more economical, but because of their added volume the percentage might be the same at the end of a period of time.

Q. Wouldn't you imagine, Mr. Mekjian, that operating an 80-store chain that you have distribution problems and buying problems which are many times more difficult and complex than any that you face?

A. Oh, sure.

[fol. 1043] Q. And wouldn't you imagine that there might come a time when in order merely to do as well as you do in your store, in terms of cost and distribution, that a chain has to take these buying and distribution and warehousing functions away from an intermediary such as Certified and grapple with them directly?

A. I can't answer that question because I haven't been in both situations.

Q. That is another possible explanation for why a chain builds a warehouse, isn't it?

A. There are many possibilities that I don't know about, and that could be one of them.

Q. And you are not able to say whether Safeway builds a new warehouse because of this fact or because they think they get some advantage; isn't that correct?

A. Well, not knowing the facts——

Q. You can't say.

A. —I can't say anything.

Mr. Vaughn: I have nothing further.

Recross-examination.

By Mr. Coyle:

Q. Does Certified have a big enough fleet to service a chain like Von's?

A. I don't know.

Mr. Coyle: I will ask that this document entitled "Testi-
[fol. 1044] mony of Ernest A. Mekjian" be marked as Mekjian Exhibit No. 1.

(The document referred to was marked by the notary public as Mekjian Exhibit No. 1 for identification, a carbon copy of which is attached hereto.)

Mr. Coyle: Q. Could you identify this as a copy of the statement which has been referred to in the course of this deposition?

A. It looks identical.

Mr. Coyle: That is all I have.

Would you waive the signing of this deposition and permit counsel to introduce it in evidence without your signature, if they are agreeable to doing this?

The Witness: You being the counsel?

Mr. Coyle: The government counsel and the other gentleman. It will just make it not necessary for us to mail it to you and for you to read and sign it.

The Witness: The only thing I certainly don't mind this being entered in any court. I just don't want to be pulled away for ten or fifteen days from my place of business. I haven't got time for it. That is all I am concerned about. If this is going to consist of my being away from the store for ten or fifteen days or something like that, I don't want any part of it.

(Discussion off the record.)

[fol. 1045] Mr. Coyle: Are you agreeable to waiving the signing of this deposition?

The Witness: And by waiving signing this means I don't have to appear and this appears rather than myself?

Mr. Coyle: That is correct.

The Witness: Does this mean I will not be called?

Mr. Coyle: Not necessarily. Whether you waive or not won't affect your being called.

The Witness: I waive it. You can enter it.

Mr. Vaughn: We also agree.

[fol. 1045a] IN THE UNITED STATES DISTRICT COURT

HONORABLE CHARLES H. CARR, Judge Presiding

No. 336-60-CC Civil

Transcript of Proceedings—June 11, 1963

Place: Los Angeles, California

[fol. 1046] TESTIMONY OF JEAN H. MUNTIFERING

If subpoenaed to testify, Jean H. Muntifering would testify as follows:

1. He was the owner and manager of Best Food Center, 7151 Woodley Avenue, Van Nuys, Los Angeles County, California. He had been in the grocery business for the past twelve years and has owned and operated the grocery store at this address for the past nine years. The gross sales of Best Food Center in 1959 were about $125,000. On July 21, 1961, he transferred his business to 131 So. Topanga, Topanga, California.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, Mr. Muntifering closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. He subscribes to the Key Services, and follows the prices of all of the major chains appearing in those booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store Age" and the "Progressive Grocer."

3. On the basis of his continued study of retail gro- [fol. 1047] cery merchandising in the Los Angeles metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization,

he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that a single store operator cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result, fewer [fol. 1048] grocery stores are needed in the area to serve a comparable number of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed sitribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the picture presented in the defendants' exhibits which show that in the period between 1950 and 1958 the market share of the eight largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the nine largest chains

increased from 34.3 per cent to 41.7 per cent; the market share of the fifteen largest chains increased from 38.4 per cent to 50 per cent; and the market share of the twenty largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would [fol. 1049] testify that these figures also corroborate his own understanding, based upon his experience of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

8. He would state in his testimony that he observed the operation of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

9. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair, and Food Giant, were among the leading firms in the area.

10. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain simce the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for new locations is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same line and the stores are known [fol. 1050] as "Von's and Shopping Bag."

11. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of Von's, that the competition which Von's faces has not been "cut throat" or "devastating" and that there are no "intense price wars." He would testify, however, that he faces very vigorous competition from Von's.

12. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between

Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

13. He would state that if this merger of Von's and Shopping Bag is permitted, there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1051] TESTIMONY OF PAUL PALMER

If subpoenaed to testify, Paul Palmer would testify as follows:

1. He is president and sole stockholder of a five-store chain of grocery stores in the Los Angeles area known as "Country Cousins Markets". The principal office of the company is located at 23736 Lyons Avenue, Newhall, California. The stores are located in Thousand Oaks, Sylmar, Montrose, San Fernando and Newhall. The chain has gross sales of about $170,000 per week. Mr. Palmer has been in the grocery business for approximately 16 years.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, he closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. He subscribes to the Key Services and follows the prices of all of the major chains appearing in these booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bulletin",

"Super Market Merchandising", "Chain Store Age" and the "Progressive Grocer."

[fol. 1052] 3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observation.

4. He would testify that single store operators cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because the landlord wants the name of a big chain in his shopping center as an attraction to other tenants. As a result, single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the large chains. Country Cousins has tried to get into the shopping centers which are the preferred sites for supermarkets but it has been unable to do so since Country Cousins does not have the established name of an area-wide chain.

5. He has observed that the decline in the number of grocery stores in the area also arises from the increasing [fol. 1053] size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result, fewer grocery stores are needed in the area to serve a comparable number of people.

6. The witness would testify that single store operators and small chains such as his do not have their own highly developed distribution systems. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the pro-

ducer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from the Certified and Spartan Cooperatives and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the large chains on dry grocery products. He would state that the cooperative does not carry such major products and dairy, meat and product items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their ware- [fol. 1054] housing and distribution systems. Thus they have combined the advantages of the cooperative with direct purchasing and a highly developed distribution system. In addition some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

9. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.3 per cent to 41.7 per cent; the market share of the 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

10. He would state in his testimony that he observed [fol. 1055] the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of

groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

11. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair and Food Giant, were among the leading firms in the area.

12. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the lines and the stores are known as "Von's & Shopping Bag".

13. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of Von's, that the competition which Von's faces has not been "cut throat" or "devastating" and that there are no "intense price wars". He would testify, however, that he faces [fol. 1056] very vigorous competition from Von's.

14. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

15. He would state that if this merger of Von's and Shopping Bag is permitted there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1057] DEPOSITION OF PAUL PALMER, taken on behalf of defendants, at 433 South Spring Street, Los Angeles, California, commencing at 2:00 P.M., Tuesday, April 16, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

PAUL PALMER, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Alsup:

Q. Mr. Palmer, would you state your name and address, please.
A. Paul Palmer, 23736 Lyons Avenue, Newhall.
Q. Is that your home address?
A. Business address.
Q. Where is your home address?
A. 701 Meyer Street, San Fernando.
Q. What is your age, Mr. Palmer?
A. Forty-two.
Q. How long have you been in the grocery business?
A. For myself since 1946.
Q. Prior to that?
A. Prior to that it was just after school work and so forth.
Q. Working for others?
[fol. 1058] A. Yes.
Q. In 1946 you went into business for yourself?
A. Yes.
Q. Where was that?
A. 5946 Sunset Boulevard in Hollywood.
Q. Did you buy that store?
A. Yes. That was a partnership.
Q. Composed of yourself and who?
A. Myself and Tom Palmer.
Q. Had he owned the store before and sold you an interest in it?
A. Yes, that's correct.
Q. What was your investment in it?

A. About $6500, to the best of my recollection.

Q. How long did you have that partnership interest in this store on Sunset Boulevard in Hollywood?

A. Until 1950.

Q. What happened in 1950?

A. I dissolved and went in for myself in Tujunga.

Q. Did you sell your partnership interest back to your uncle?

A. Yes.

Q. For how much money?

A. $5,000.

Q. You went into business for yourself in Tujunga at [fol. 1059] what address?

A. 7421 Hillrose Street, Tujunga.

Q. Was that store in existence when you acquired it?

A. Yes. It had been for a three-month period.

Q. From whom did you buy that store?

A. William Ralser.

Q. What was your investment in that store?

A. If I remember correctly, around $4500—four to five thousand. I am not absolutely sure there.

Q. You still have that store?

A. No, I haven't.

Q. When did you sell that?

A. 1956.

Q. To whom did you sell it?

A. Community Markets.

Q. What was the sales price?

A. Again I would just have—To the best of my memory I believe it was $15,000.

Q. Is that still being operated by Community Markets?

A. No.

Q. Is it being operated by anyone?

A. Yes. It is open now as a liquor-deli combination, a small market.

Q. Do you have any interest in this liquor-deli operation?

[fol. 1060] A. No.

Q. What was the size of that store, Mr. Palmer?

A. Approximately 4,000 square feet.

Q. When you sold it in 1956 did you then buy another store?

A. Well, no, not at that time. During the period from—well, in '52, to be exact, I opened another store.

Q. Where was that?

A. In Sylmar.

Q. What was the address in Sylmar?

A. 13376 Sayre Street.

Q. You say you opened this store in Sylmar. Did you have it constructed for yourself?

A. No. It was a leased building. It was constructed by others.

Q. What did you pay for the lease?

A. Just the first and last months' rent.

Q. Had it been operated previously by someone in the grocery business?

A. No, it hadn't.

Q. Was it constructed for you?

A. No. It was constructed for a market, not specifically for me. It was for lease after it was constructed.

Q. You got the lease on it in 1952. Are you still operating that store?

[fol. 1061] A. No. I was up until January of this year.

Q. What happened in January of this year?

A. Well, this was also a small market and we had an Alpha Beta open up directly across the street, so it ceased to be a paying proposition.

Q. And you gave up your lease?

A. I sold it.

Q. Sold your lease?

A. Sold the market, lease included. I still have to guarantee the lease.

Q. To whom did you sell the market?

A. Howard Broyles.

Q. Is he operating it as a market now?

A. Yes.

Q. Were there any other stores that you opened up between the years 1950 and 1956, other than this Sylmar store?

A. Yes. One at 13040 Glen Oaks Boulevard, also in Sylmar.

Q. When was that?

A. 1954.

Q. Is that store still open?

A. Yes.
Q. Being operated by you?
A. Yes.
[fol. 1062] Q. Any others?
A. Any others from 1950 to 1956?
Q. Yes.
A. No.
Q. Any after 1956?
A. Yes. In 1958, 23736 Lyons Avenue in Newhall.
Q. That is your headquarters store now?
A. Yes.
Q. Any others?
A. 1960 Thousand Oaks.
Q. Any others?
A. No. With the exception of the liquor-deli that we already covered, I had to take that lease back and I re-opened it for a short period just to get an approximation, probably four to six months, and re-sold that. That was in '61, I think.
Q. And none since that time?
A. No.
Q. Do you have an interest in the market in the Strathern Shopping Center in Simi, California?
A. No. I negotiated for a lease but it fell through.
Q. Do you know who got the lease on that Strathern Shopping Center?
A. I believe it was given up as a whole. I don't believe it was ever let out, to the best of my knowledge.
[fol. 1063] Q. You mean the Strathern Shopping Center wasn't built?
A. Yes.
Q. It just never has been constructed?
A. No, it hasn't. Just a bowling alley is all that ever went up.
Q. So at the present time you have how many markets, Mr. Palmer?
A. Four.
Q. That is since you sold this one in January of 1963?
A. Yes.
Q. What is the size of this market which is your headquarters market on Lyons Avenue in Newhall?
A. 17,000 square feet, approximately.

Q. What is the size of your Thousand Oaks market?

A. 24,000, also approximately.

Q. Would you tell us the size of your other two markets?

A. The Glen Oaks is approximately 8,000. We never did get to the Montrose. That is 16,000, that is 2931 Honolulu Avenue.

Q. In Montrose?

A. Montrose.

Q. When was it that you——

A. That was 1960 also.

[fol. 1064] Q. We have been furnished, Mr. Palmer, with a statement of testimony of Paul Palmer which states if subpoenaed to testify you would testify as set forth in that statement. Do you have your copy of that?

A. Yes.

Q. Did you read that before you signed it?

A. Yes.

Q. Have you read it recently?

A. No. I scanned through it but I haven't read it thoroughly. I a mnot sure whether this is the correct copy or not. This is the one that has some corrections made on it. Whether there is another copy of this I don't know. If I have it I have mislaid it.

Q. May I see the copy you have for the moment?

A. Yes.

Mr. Hughes: May I see it?

Mr. Vaughn: Sure.

Mr. Alsup: Q Mr. Palmer, it appears that the copy that we have been furnished by the government attorneys is the same as your copy, having the corrections made upon it which you have made in ink. One of the statements, in the original copy which was given to us, was that Country Cousins does not have a Triple A financial rating. You struck that "Triple A financial rating" language out and inserted "does not have the established name of an area-wide chain." Do you have a Triple A financial rating?

[fol. 1065] A. Yes, I believe we have a Triple A financial rating.

Q. The Strathern Shopping Center, which you said fell

through, was never constructed. You had negotiated a lease for the grocery store to be in that center, had you not?

A. Yes.

Q. You were the accepted tenant when it was to be built?

A. Correct.

Q. Do you know whether it will be built?

A. No. To the best of my knowledge it won't be. It will be changed into an apartment house development due to the fact that Thriftimart is going directly across the street with a commercial development, including major tenants such as Thrifty Drug and so forth. That was the reason for giving it up.

Q. In addition to these four supermarkets——

A. Well, three I would say, yes.

Q. The 8,000 square foot you would not call a supermarket?

A. Right.

Q. The other three you would?

A. Yes.

Q. Do you have any other business interests?

A. Outside of the market business?

[fol. 1066] Q. Yes.

A. Yes. I have a bowling alley, bowling lanes.

Q. Is that the Country Cousins Lanes right by your headquarters store?

A. Yes.

Q. What is your investment in that bowling establishment?

A. Well, the total investment would run close to between five and six hundred thousand.

Q. When you started in business in 1946 by purchasing a half interest in your uncle's market on Sunset Boulevard, did your investment represent your total assets at that time?

Mr. Coyle: Mr. Alsup, this is irrelevant, what this man's assets were at that particular time. That is his own personal business.

Mr. Alsup: Q. You may answer the question, Mr. Palmer.

A. No, they weren't.

Q. What other assets did you have at that time?

A. Well, again I would have to just give you an approximation, I guess. I can't remember exactly. I would say I had, oh, maybe another eight, ten thousand in assets.

Q. What would you say your net worth is now?

A. Probably less than that, if you get down to net worth. That would be awful hard to answer.

[fol. 1067] Q. Is Country Cousins incorporated?

A. Yes.

Q. When was it incorporated?

A. 1956, I believe.

Q. You say it has a Triple A financial credit rating?

A. Well, now, would you define Triple A for me?

Q. I will have to ask you because it was in your statement which you crossed out.

A. No. The reason we were crossed out, we were not turned down because of a financial rating. The reason we struck that language is just merely because that wasn't the fact. We were not turned down because of any financial problem whatsoever, we were turned down because of the lack of drawing power for major tenants in shopping centers. Not that we were financially unable to go through with the transaction. But just like I explained, they wanted major tenants and not secondary ones.

Q. Yet you weren't turned down by this proposed developer of the Strathern Shopping Center.

A. No.

Q. Do you have any idea at all of the net worth of your corporation?

A. Oh, I would say probably between a million and a half and two million dollars.

Q. Are you the sole stockholder, Mr. Palmer?

[fol. 1068] A. Yes.

Q. Mr. Palmer, back in 1961, before you were contacted by the government attorneys you talked to Mr. Clive Johnson of the law firm of Johnson, Bates & Sheffield about this merger of Von's and Shopping Bag, did you not?

A. I talked to somebody. I don't recall the name at all.

Q. Do you recall telling this someone that you could not understand why this suit was brought against Von's and Shopping Bag?

A. No, I don't recall that exact terminology.

Q. What do you recall telling him?

A. To tell you the truth, I don't recall very much about the conversation. But if I said something on that line it would be just amazement is all, not for reason or fact. Just sort of amazed that anyone would bring a suit or file a suit on this sort of thing. It was just news to me was all.

Q. And you recall talking to me on the telephone on February 12, 1963?

A. A short while back, yes.

Q. And I told you I would like to interview you about your statement that you had given to the government and I think you said you were going out of town until the 26th and you would call me when you got back. Do you recall that?

A. Well, I believe you were going to call me, weren't [fol. 1069] you, after the 26th?

Q. And you said that you would interview me if the government attorney would be present; is that correct?

A. Well, I agreed to the interview, yes. I don't recall if the government attorney being present was part of it.

Q. Do you recall telling me in that conversation that quote to this day I don't understand why this suit was brought, but when I talked to Mr. Johnson I did not know there was a law against a company getting bigger by merger and this was explained to me by the government attorneys unquote?

A. I can't say that I recall that. I can't say whether I did or did not say that. I just don't recall.

Q. What did the government attorneys explain to you in regard to the fact that there was a law against a company getting bigger by merger?

A. Mr. Coyle: This is obviously irrelevant, Mr. Alsup. Ask the witness some of the factual questions.

Mr. Alsup: Q. You may answer, Mr. Palmer.

A. Would you read the question, please.

(The reporter read the pending question.)

Mr. Alsup: I will rephrase the question.

Q. Did the government attorneys explain to you that there was a law against a company getting bigger by merger?

Mr. Coyle: Let me say that there is a law against a com- [fol. 1070] pany making acquisitions which may lessen competition or tend to create a monopoly and it is irrelevant whether the government attorneys explained that to this man or not. He is entitled to know what the law is.

Mr. Alsup: Q. Now will you answer the question, Mr. Palmer?

A. I don't recall anything being said about a law either way. They merely explained the proceedings to me, why they were interested in the merger. I don't recall anything being said about law.

Q. Nothing was said about it being unlawful to get larger by merger?

A. I don't believe so. I don't recall anything about the law at all.

Q. If you said that to me in our telephone conversation you were mistaken; is that it?

Mr. Coyle: He has already answered that question. He doesn't recall saying it.

Mr. Alsup: Q. Would you deny you said this to me in our telephone conversation?

Mr. Coyle: He has denied it. He said he doesn't know.

The Witness: Denied that he said that or the government attorneys explained the law to me.

Mr. Alsup: Q. They explained to you that there was [fol. 1071] a law against a company getting larger by merger?

A. I wouldn't deny it, no. I also wouldn't acknowledge it because I don't recall it. I don't recall the conversation. If you say I said it I will take your word for it.

Q. Do you recall what was said by the government attorneys about this merger?

A. No, not word for word I don't. They merely explained their position in the case and getting into the case and general conversation. I don't recall any word for word, no.

Q. Would give me the substance of what you recall?

A. Well, on the general order of mergers lessening competition and why there is a government interest in the pro-

ceedings. And generally that's about all we talked about. There was nothing specific at all.

Q. And after that conversation and on February 12, 1963 didn't you tell me on the telephone that to this day you cannot understand why this suit was brought?

Mr. Coyle: That has been asked.

The Witness: I don't recall actually saying that.

Mr. Alsup: Q. Do you recall saying anything like that?

A. That I do not know why the suit was called?

Q. Was brought.

A. No. Because it hadn't been explained to me why it was brought actually.

[fol. 1072] Q. Do you recall that in that telephone conversation you told me that you had felt that Shopping Bag before the merger were real good competitors?

A. Yes. I don't recall that in the conversation, but that is a fact. That is what I recall.

Q. Do you recall saying this is because their prices were a little higher than the others?

A. I could have said that.

Q. Do you recall saying that Von's sells at lower prices than the other chains and therefore you felt this merger was bad?

A. Yes, I could have said that because that is the way I feel.

Q. What Shopping Bag Stores did your four stores compete with prior to the merger?

A. Foothill Boulevard and Sayre Street, and Foothill—I don't know exact addresses. It would be Foothill-Sunland Shopping Bag and the Foothill-Montrose Shopping Bag.

Q. What Von's Stores did your stores compete with prior to the merger of Von's and Shopping Bag?

A. To the best of my knowledge there were no Von's Stores in the area prior to the merger.

Q. From your study of the industry, Mr. Palmer, would you say that for the most part the Von's Stores were located in the west and southern section of the Los Angeles [fol. 1073] metropolitan area whereas the Shopping Bag Stores were in the north and eastern sections?

A. Yes, that's correct.

Q. You indicated that the Shopping Bag prices were a

little bit higher than the others prior to the merger and they were therefore good competitors.

A. I don't believe I said "the others." I believe I said higher than now. Shopping Bag individually maintained a better mark-up than they do as Von's-Shopping Bag. That is what I meant.

Q. Which of your stores does the Shopping Bag Store at Foothill and Sayre compete with?

A. Well, at the time it was the Glen Oaks Store and prior to January it was also the Sayre Street Store.

Q. How far was that Shopping Bag Store at Foothill and Sayre from your Glen Oaks Store?

A. Oh, I would say a little over a mile, maybe a mile and an eighth, a mile and a quarter.

Q. How far was it from your Sayre Street Store?

A. A little over half a mile.

Q. What store of yours did the Shopping Bag Foothill-Sunland Store compete with?

A. That was the 7421 Hillrose Street. There was a Shopping Bag Sunland and also Shopping Bag Tujunga. They were a mile apart.

[fol. 1074] Q. This 7421 Hillrose was the store you acquired in 1950. Did you thereafter sell it?

A. In 1956.

Q. What stores of yours did the Montrose Shopping Bag Store compete with? Your Montrose Store that you have earlier mentioned?

A. Well, that would also be the same market as the Tujunga Store.

Q. You are now referring to the Tujunga Shopping Bag or——

A. No. The Montrose Shopping Bag would be in competition with my Tujunga Store, the same one, 7421 Hillrose.

Q. I see. The one you sold in 1956.

A. Yes.

Q. What Von's or Shopping Bag Stores compete with your stores at the present time?

A. Well, we have a Von's Thousand Oaks and the one we just mentioned in Sylmar and the Von's Montrose.

Q. That is a former Shopping Bag in Montrose?

A. Yes.

Q. Thousand Oaks is not in Los Angeles or Orange County, is it?

A. No. Ventura County.

Q. Do you have a store at 13524 Eldridge Street, San Fernando? Is that the one you previously mentioned?

[fol. 1075] A. No. That is the same address as 13376 Sayre Street, Sylmar. That is a corner location. It is sometimes called on either street.

Q. Would you take each of your four stores that you are now operating as Country Cousins and list the competitors for us that you have for each of these stores?

A. Well, starting with Montrose we have the Von's-Shopping Bag.

Q. That is how far away, again?

A. Approximately a mile. Then we have a Safeway approximately a mile. There is a Von's-Shopping Bag in either direction, there is two of them at that location. So it would be a mile either way. There are two Von's.

Q. Both former Shopping Bag Stores?

A. Yes. There are also two Safeways, the same geographical setup. There is one on either side.

How far an area do we want to cover?

Q. What do you consider the draw area of your Montrose Store?

A. Oh, approximately two square miles. We have a Ralphs that is, I would say, about two and a half to three miles away, Alexander's approximately the same distance. That pretty well covers that location, to the best of my knowledge.

Q. No single store operators within this area?

[fol. 1076] A. Yes.

Q. Would you name those?

A. There is a very small market a block and a half away, I believe it is called the Trade Rite Market. There is a Shop Easy Market approximately three miles away. The real small ones I couldn't begin to name for you because I don't have that knowledge. I don't pay any attention to that.

Q. Do you regard the small ones, such as Trade Rite, as competitors of yours?

A. Well, yes. They are competitors in the sense of the word.

Q. What sense do you use it?

A. Well, they maintain different hours that they are open for business. Now, this is just an opinion. I wouldn't want to—I mean they do charge and delivery business which does make them a competitor.

Q. Have you been in this Trade Rite Market, which is a block or a block and a half away from your Montrose Store?

A. Yes, a few years ago.

Q. A few years ago?

A. Yes.

Q. What was your impression of that?

A. Well, it's a small market.

Q. Are you acquainted with the owner of Trade Rite, Mr. August?

[fol. 1077] A. I met him once, that's all.

Q. Would you regard that as a first class operation likely to attract customers who would be attracted to your store?

A. No.

Q. Your store, I might say, I have been in several of them, Mr. Palmer, are very well stocked and very attractive stores. I am sure you attract a great number of customers because of the way you merchandise. Wouldn't you say that?

A. Well, I would say that is our primary aim.

Q. You can't think of any other stores of single store operators or small chains in this area, the competitive area of your Montrose Store other than those you have mentioned?

A. No. I know there are others but I can't, as far as names and addresses and so forth, I couldn't give them to you.

Q. Can you think of any in that area which have gone out of business?

A. No, not to my knowledge.

Q. Let us take your next store, Mr. Palmer. That is your headquarters store.

A. Yes. That is Newhall.

Q. What are the——

A. Safeway is approximately a mile and a quarter, there is a Country Store three-quarters of a mile away.

[fol. 1078] Q. Is that the name of it?

A. Country Store, yes.

Q. People confuse it with Country Cousins?

A. Occasionally. There is a Tumble-In Grocery about a mile and a half. Then we have to stretch out to find further competition. The next competition is probably five miles away.

Q. Would you regard that as competition for your Newhall Store?

A. Well, only in the sense that there are people in that area that do drive to us that stop off there occasionally and pick up shorts and so forth.

Q. Stop off at this store five miles away?

A. Yes.

Q. What is that store?

A. I believe the name of it is Thrifty Shopper. That is about all in that area.

Q. When was this Safeway Store built?

A. That is an old store. I couldn't say when it was built. It was quite a while back.

Q. Prior to the time that you acquired your Newhall Store?

A. Yes.

Q. Were the two Shopping Bag Stores that you mentioned earlier, a mile away in each direction from your [fol. 1079] Montrose Store, in existence at the time you got your Montrose Store?

A. They were in existence as—I can't be sure whether they were Shopping Bag or Von's-Shopping Bag, without checking. They were in existence as one or the other.

Q. You got your Montrose Store in 1960?

A. Yes.

Q. But these two stores had been there for some time before you got your Montrose Store.

A. Yes, yes.

Q. And your Montrose Store is a newer and larger store?

A. No, no. I acquired the Montrose Store. It was an existing market when I took it. I can't say whether—No, I know it is older than one of the Von's. The other one I couldn't say.

Q. Would you tell us who you bought your Montrose Store from?

A. Fred Rebal.

Q. Did you buy the store or just buy the lease?

A. No, I just bought the lease.

Q. When you bought that lease you had a mile away in each direction these two Shopping Bag Stores. How about these two Safeway Stores?

A. One at a time.

[fol. 1080] And one has come in since?

A. Yes.

Q. How about the Ralphs Store which is two and a half to three miles away?

A. That was existing.

Q. How about the Alexander's Store?

A. Also existing.

Q. How about the Shop Easy?

A. No, that was since.

Q. That is a store which has opened up since 1960?

A. Yes.

Q. Is that a single store operation?

A. Yes. Well, no, I believe they have—I couldn't say one or two others. I would just be guessing.

Q. With respect to your Newhall Store you mentioned the Safeway a mile and a quarter away was already in existence. Was this Country Store already in existence when you acquired your Newhall Store?

A. Yes.

Q. Was the Tumble-In?

A. Yes.

Q. Was this Thrifty Shopper?

A. No.

Q. That has come in since you opened your Newhall Store?

[fol. 1081] A. Yes.

Q. Is that a single store operation?

A. To the best of my knowledge, it is, yes.

Q. Have you observed any decline in the number of stores in the competitive area of your Newhall Store?

A. No.

Q. This store at 13040 Glen Oaks, Sylmar, that is the same as 13524 Eldridge Street, San Fernando?

A. No. The Eldridge Street address is the one that I have sold in January.

Q. I see.

A. That also should be Sylmar, to correct your records. It isn't San Fernando.

Q. This Glen Oaks Store, that is the one at the corner of Polk and Glen Oaks?

A. Right.

Q. Now I have it. You acquired this store at Polk and Glen Oaks in 1955?

A. 1954.

Q. Was that a new store at that time?

A. Yes.

Q. Was it built for you?

A. Yes.

Q. Did you own the building?

A. No.

[fol. 1082] Q. You leased it?

A. Yes.

Q. At the time that you leased that store in 1954 what other stores were there in what you would regard as the competitive area?

A. There was nothing there whatsoever.

Q. Nothing there?

A. There was nothing in the area at all at that time.

Q. That would be within a two or three mile radius of your store?

A. Well, in that far, the three mile or two mile, it would be one market at the time existing that I can think of offhand. That would be on Foothill Boulevard and Sayre Street, Phil's Market.

Q. Have other stores come into that area since that time?

A. Yes.

Q. Would you name them?

A. Alpha Beta, Shopping Bag, Boy's. That's about it.

Q. Any single store operations?

A. No, not that I can recall.

Q. Any smaller chains?

A. No, not in that area. Not in that wide an area.

Q. So that the only stores you believe you compete with at your Glen Oaks Store in Sylmar are Phil's Market at

[fol. 1083] Foothill and Sayre, this Alpha Beta, Shopping Bag and the Boy's Market which you have mentioned; is that correct?

A. Yes.

Q. When was the Alpha Beta Store built?

A. It was opened in October, I believe, of '62.

Q. How far away from your store is that?

A. Two miles.

Q. When was the Shopping Bag Store built?

A. I would be guessing. I would say latter '58 or early '59.

Q. Can you give us the address of that Shopping Bag Store?

A. Exact address?

Q. No, just generally.

A. Foothill and Sayre.

Q. How far away is that from your Glen Oaks Store?

A. A mile and a quarter, a mile and a half.

Q. When was the Boy's Store opened?

A. November of '62, I believe.

Q. How far away is that?

A. Three-quarters of a mile.

Q. I take it that you have not seen any stores go out of business from the period 1954 to 1963 in the area of your Glen Oaks Store.

A. No, to my knowledge there hasn't been.

[fol. 1084] Q. I could ask you about Thousand Oaks, Mr. Palmer, but it is outside of the area that we have agreed upon as a relevant area and it seems to me it would just take time.

Mr. Alsup: Do you agree, Mr. Coyle?

Mr. Coyle: It is irrelevant. I would object if you asked.

Mr. Alsup: Q. You don't own a store on Honolulu Avenue in Verdugo City, do you?

A. Well, that is what I refer to as the Montrose Store, 2931 Honolulu Avenue.

Q. I must have been working from a bad map, Mr. Palmer.

A. They frown on calling that Verdugo City any more. I don't know why.

Q. This statement which we have been furnished, and a

copy which you have in front of you, says that your chain has gross sales of about $170,000 per week.

A. That was true at the time the statement was made.

Q. Since that time you have sold one of your stores?

A. Yes. And we have also had additional competition. Alpha Beta and Boy's Market opened.

Q. That is Alpha Beta and Boy's opening up in the area of your Glen Oaks Store took some of your business?

A. Yes.

Q. What were the gross sales of your Glen Oaks Store, if you recall, in 1961?

[fol. 1085] A. Slightly over two million.

Q. And what were the sales of that store in 1962?

A. About a million and three-quarters, I would guess.

Q. What were the sales of that Glen Oaks Store, if you recall, when you opened up in '55?

A. Probably around $500,000.

Q. And what were they in '56, if you recall?

A. Well, I would say substantially the same. I would have to check to give you an exact answer.

Q. Just to the best of your recollection is fine, Mr. Palmer. Do you recall what they were in '57?

A. '57 they probably doubled. They probably got to the million mark by that time.

Q. How about 1958?

A. Well, again to the best of my knowledge in '58 through '61 they would stay about the same, a little over two million.

Q. A little over two million?

A. Yes.

Q. The opening of this Shopping Bag Store a mile and a quarter to a mile and a half away, in either 1958 or 1959, apparently did not affect your sales volume.

A. They did slightly during the course of the first few months they were open. The first two or three months they affected it slightly but it was a growing area and as an [fol. 1086] overall picture they didn't affect the volume.

Q. How did your prices in your store there at Glen Oaks compare with the Shopping Bag prices?

A. Favorably. We were on a par.

Q. Paragraph 2 of your statement says that in order to continue in business a grocery retailer must keep well in-

formed on every change in marketing conditions in the Los Angeles metropolitan area. What portions of Los Angeles County and Orange County have you studied in connection with your operations?

A. Well, primarily my immediate concern, the areas that affect my own locations. And naturally going on further in traveling about and reading different publications and so forth I gain a little knowledge what is going on in the rest of the world.

Q. From your studies and your reading of the trade papers have you found out about the discount houses opening up in the Los Angeles metropolitan area?

A. Yes, very much so.

Q. What have you learned about that?

A. Well, this is also just my own opinion. I am not real concerned with discount operations. They don't seem to—They might attract to begin with but they don't seem to hold the consumer like a regular supermarket does.

Q. About how many discount houses with food operations [fol. 1087] would you say that there were in the Los Angeles metropolitan area?

A. Food units?

Q. Yes.

A. Well, guessing I would say about between 18 and 25.

Q. Is this a development which has occurred since 1960?

A. Yes. The majority of them.

Q. In this same period have you observed that bantam stores have been opening up in this Los Angeles metropolitan area?

A. There was an influx of bantam stores, yes.

Q. In the period 1960 to date?

A. Well, I would say from '59, the peak would probably be from '59 through '60. In my opinion they have tapered off since that time.

Q. About how many of those do you believe there might be in the Los Angeles metropolitan area?

A. That would be real hard to answer because I don't keep that close a watch on that.

Q. Would you say there are quite a few of them?

A. Yes.

Q. Since 1960 have you noticed from your readings in

the trade papers of the failures of some of the major chains?

[fol. 1088] A. Well, one of the major chains, yes.

Q. Which one is that?

A. Fox.

Q. That went into bankruptcy?

A. I have heard all kinds of stories. I am not really up on what did happen.

Q. Do you know whether a lot of the Fox Stores were sold off to single store operators and small chains?

A. I understand there are a lot for sale. I don't actually know of one of my own knowledge that was purchased but I have heard rumors and so forth, but no actual facts.

Q. Have you heard that Food Fair, which is the sixth largest chain in the nation, has entered the market and taken over the operation of the remaining Fox Stores through bankruptcy?

A. Yes, that is something I have heard, also unconfirmed.

Q. Have you heard or read in your readings of the trade papers of what happened to McDaniel's?

A. Yes.

Q. What did you read?

A. Well, again it is just something I read or heard, that they also went bankrupt and were taken over by different operators. I know Food Giant took some of them, I believe Hughes Markets took some of them.

[fol. 1089] Q. And some of them were sold to single store operators?

A. That I have no knowledge of.

Q. What have you read in the trade papers about Yor-Way?

A. I know Yor-Way went under quite some time ago.

Q. Bankruptcy?

A. Well, when you ask me bankruptcy——

Q. All I want to know is what you read or recall reading, Mr. Palmer.

A. Well, this has been quite some time back. Whether they closed voluntarily or went into bankruptcy I don't recall.

Q. Did you read of a number of their stores being sold to small chains and single store operators?

A. I can't say that I have, I can't say that I haven't. That was out of our area. I didn't pay a whole lot of attention to it.

Q. Basically you confine your attention to your competitive area, do you not?

A. Yes.

Q. Paragraph 3 of your statement, Mr. Palmer, states that on the basis of your continued study of retail grocery merchandising in the Los Angeles metropolitan area you would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. What was the study on which that conclusion was based?

[fol. 1090] A. Well, my own study would be the minimum markets, you refer to them as bantams, that came in with a flurry there and went out the same way. And the fact that statistics that I have come across in trade journals and trade papers and so forth that show the different graphs from '48 to '58, and so forth, that show the independent operator diminishing.

Q. That hasn't occurred in any of the areas with which you are primarily concerned, has it?

A. Well, yes, it has. If you are going to count markets like we were talking about, such as Trade Rite and so forth. Now, this sort of market I have seen closed and reopened and change hands and so forth. But I couldn't right offhand give you names and addresses and so forth.

Q. Trade Rite is open right now, isn't it?

A. Yes. I just use that as the type of market I was referring to, not the Trade Rite Market itself.

Q. You have sold and bought stores yourself in the same period, haven't you?

A. I bought one and sold two, yes.

Q. In the same period in which you state that the number of single store grocery retailers operating in the area declined you have observed also, have you not, a number of new concerns entering the area?

A. You mean as single store operators?

Q. Starting as single store operator, yes.

[fol. 1091] A. Well, I would say that there has been. Again I can't specify where the addresses are.

Q. Do you know when Joe Hughes started Hughes Markets?

A. Not the exact time, no. Probably when, 1962 or '3?

Q. That was with a one-store operation, wasn't it?

A. Well, I could be wrong but I don't believe it was a one-store operation.

Q. Do you have any idea how large the Hughes chain is today?

A. Fourteen stores, to the best of my knowledge.

Q. In this same period you got started as a single store operator.

A. Yes.

Q. And you have grown into a chain which does a business of several million dollars a year; isn't that right?

A. Correct.

Q. Are you familiar at all with the operation of Pantry Markets?

A. Yes.

Q. Do you know Ted Wood?

A. Slightly.

Q. A good operator, isn't he?

A. Very good.

Q. Do you know when he got started?

A. Not exactly, no.

[fol. 1092] Q. How long have you know him?

A. Probably five or six years.

Q. That was after he got started in his Pantry Markets?

A. Yes.

Q. Do you know what has happened to the Pantry Markets?

A. What has happened to him?

Q. I mean have they been able to grow and expand?

A. Yes.

Q. How large a chain is that now, do you know?

A. I believe ten units.

Q. That is based on your study of the industry, reading in the papers?

A. Well, yes.

Q. Do you know Joe Goodnight who was with Alpha Beta up until 1958 or '59?

A. Yes.

Q. Were you acquainted with him while he was with Alpha Beta?

A. No.

Q. Has he been able to start a business since '58 or '59?

A. I am not exactly sure of the starting date but I know he has been able to start a business.

Q. Do you know whether or not that business has been able to grow and expand?

[fol. 1093] A. Yes, I know it has.

Q. Do you know how many stores it has right now?

A. Seven units, I believe.

Q. In the same period other concerns have grown and expanded, have they not, Mr. Palmer?

A. Why, certainly.

Q. Are you familiar at all with the Shoppers organization?

A. No, not personally familiar.

Q. Would you look at Paragraph 3, Mr. Palmer, and tell me on the basis of your experience and your study of the industry what effect the merger of Von's and Shopping Bag has had on this decline that you refer to in the number of single store operators.

A. What effect it has——

Q. Has the merger had any effect on the decline in the number of single store operators that you refer to in that Paragraph 3?

A. Well, I couldn't truthfully point out any single factor that would be a reason for anyone not being able to continue in business. It would be awful hard for me to say that anyone caused it directly.

Q. The grocery business is like very other business, the good operator succeeds if he is lucky and the bad operator sometimes stay in business and sometimes fail; isn't [fol. 1094] that right?

A. Well, everything being equal, I would say, yes, that was right.

(A short recess was taken.)

Mr. Alsup: Q. Are you a member of the Southern California Grocers Association?

A. Yes.

Q. Do you receive their publication, the Southern California Grocers Journal?

A. Yes.

Q. Over the past year have you seen what they call their "Man of the Week" profiles about various leaders in the industry?

A. No, I missed that.

Q. You haven't seen any article on Joe Hughes or Joe Goodnight?

A. I seen the article on Joe Hughes. I don't recall the one on Goodnight.

Q. Do you recall one on a man named Yosh Inadomi?

A. No.

Q. Are you acquainted with Mr. Inadomi, by any chance?

A. No, I am not. It sounds like a produce buyer.

Q. And a very successful grocer, too.

This statement in Paragraph 4, Mr. Palmer, that Country Cousins is trying to get into the shopping centers [fol. 1095] which are preferred sights for supermarkets but it has been unable to do so since Country Cousins does not have the established name of an area-wide chain. Was that said before you had negotiated this lease on the Strathern Shopping Center?

A. I don't recall exactly whether it was before or after, but the Strathern Shopping Center cannot be called a major desirable shopping center. It wasn't that type that I was referring to.

Q. Did you know that Von's attempted to negotiate a lease to get the store in that center and were told that the developer preferred you?

A. No, that is news to me.

Q. In your studies of the grocery business, and your reading of the trade journals, Mr. Palmer, have you seen various articles that some of the grocers, the larger chains, have become a little bit disillusioned with shopping centers as good locations?

A. Yes.

Q. There are other locations besides shopping centers which in your opinion would be preferable?

A. Well, preferable to some shopping centers and not so to others.

Q. That is being in a shopping center is no guarantee of having a good operation, a successful store; isn't that correct?

[fol. 1096] A. Yes. It is not a guarantee.

Q. Prior to the merger of Von's and Shopping Bag Shopping Bag had stores in various shopping centers, did it not?

A. Yes.

Q. And Von's had stores in some shopping centers and both had stores that were not in shopping centers.

A. Yes, I would say that's right.

Q. Would you explain to me, Mr. Palmer, how the merger of Von's and Shopping Bag has affected the ability of the single store operator, or small chain, in any way to get into a shopping center?

A. Well, again I will have to answer I don't believe it is any one single factor that affects this change. Like I pointed out before, if you are a major name in a major area it is just common sense that that is the name that the developer would like to have in his shopping center. Now, whether Von's-Shopping Bag caused this or any one of the numerous other chains caused it, it wouldn't be for me to say.

Q. That was the situation before 1960, wasn't it?

A. Yes.

Q. And that was before the merger of Von's and Shopping Bag?

A. Yes, that same existed.

[fol. 1097] Q. Are you aware of the bills which have been pending in Congress attempting to get federal lease guarantees for small operators and smaller chains so that they can get into shopping centers?

A. No, I am not aware of it.

Q. You haven't read anything about any of those bills in these trade papers?

A. No, I haven't.

Q. In his statement Mr. Ted Von Der Ahe referred to those bills and said that he felt it would be desirable if Congress would enact legislation to give the smaller operator the opportunity, if that is what he wanted. Would you agree with that?

A. Well, I would have to know more about it. I couldn't say "Yes" or "No" just to that.

Q. This is an area where Congress might help the smaller operator, isn't it?

A. Yes.

Q. It is an area where breaking up the merger of Von's and Shopping Bag wouldn't help the smaller operator; isn't that correct?

A. Again I couldn't say whether that would be correct or not. I would say it would tend to help the smaller operator.

Q. What is the basis of that statement, Mr. Palmer?

[fol. 1098] A. Well, it is real hard to sit here and explain the whole thing but I think it is common knowledge that the more that any one consumer can buy from any one supplier the better the chance he has of making his own deal. And the cheaper you can buy the cheaper you can sell, and it is going to hurt the fellow that can't buy in those quantities and sell as cheap as the one that can buy in those quantities.

Q. You are a member of Certified Grocers, aren't you?

A. Yes.

Q. Can you name for me a single chain doing business in that Los Angeles metropolitan area that has the buying power of Certified Grocers?

A. There isn't one.

Q. Can you name a single chain in this area doing business in this area which has the buying power of Orange Empire?

A. I am not familiar with Orange Empire's operations so I couldn't say.

Q. You haven't read anything about that in any of the trade papers?

A. I have read about Orange Empire, certainly. But as far as their volume, they have 38 units, I believe, in the entire, and they go into Arizona, Texas, and their volume is all lumped in one sum. So I couldn't tell you what they do in Southern California and what they do in Texas.

[fol. 1099] Q. As a member of Certified you are one of the owners of Certified Grocers, are you not?

A. Well, I have stock in Certified Grocers, yes.

Q. And Certified Grocers is owned by the retailers such

as yourself who are members of Certified Grocers; isn't that right?

A. Yes, that's right.

Q. In Paragraph 6, Mr. Palmer, you state that single store operators and the small chains such as yourself do not have their own highly developed distribution systems. Do you have a warehouse?

A. Yes.

Q. Where is that located?

A. Newhall.

Q. Do you warehouse some of the groceries in this warehouse that you buy?

A. Yes.

Q. Do you distribute from that warehouse to your other stores?

A. Yes.

Q. Do you have a trucking facility to distribute the goods?

A. Yes.

Q. Do you also take deliveries at your store from Certified Grocers?

[fol. 1100] A. Well, in our case Spartan Grocers are the largest supplier.

Q. And you take deliveries at your stores from Spartan?

A. Yes.

Q. And also from Certified?

A. Very seldom from Certified. You probably know Spartan and Certified are one and the same.

Q. Yes. But you do sufficient volume, do you not, to be serviced by Certified?

A. Yes, certainly.

Q. Why do you prefer to be serviced by Spartan?

A. Well, I was a Spartan member before Certified and Spartan became one, and I just continued on.

Q. Certified and Spartan warehouses are very large, are they not?

A. Yes.

Q. Are they larger than that of Von's?

A. I have never seen Von's warehouse so I hesitate to answer.

Q. These warehouses of Certified and Spartan are serviced by railroad shippers, are they not?

A. Yes.

Q. And Certified and Spartan operate large trucking facilities?

[fol. 1101] A. Yes.

Q. And Certified is able to buy in heavy volume directly from the producer and deliver the product to the store of its members; isn't that right?

A. That's right.

Q. Would you now look at your Paragraph 6 and read the last sentence and tell me how the warehouses operated by Von's and other large chains that you refer to give these chains an advantage over independents and small chains in terms of inventory control.

A. Well, you are talking strictly of dry groceries and your Certified and Spartan compared to Von's warehouse. I was referring mainly to produce, meats and non-dry grocery items.

Q. I think you refer to that in your Paragraph 7, Mr. Palmer. I am asking you to look at your last sentence in Paragraph 6.

A. Well, the entire paragraph also was meant to cover the whole operation, not just dry grocery operations. I can't see where it points out dry grocery as an individual item.

Q. I see. So that when you refer to the advantage over independents and small chains in terms of inventory control you are basically thinking of meat and produce and milk?

A. Well, I would say non-dry groceries, milk, produce, [fol. 1102] dairy foods, bread deliveries and so forth. Items that are not covered by co-op buying, that is what I was referring to mainly.

Q. Can't you get your bread through Certified?

A. There is one bread billed through Certified.

Mr. Knight: He is not a member of Certified.

The Witness: Or through Spartan.

Mr. Alsup: Q. Is bread an item that a concern like Von's would store in its warehouse?

A. No, not necessarily store in a warehouse. To be spe-

cific, I tried to get a deal from a large bakery a couple of days ago on the same setup that a chain has and they turned me down. They just flat out refused to give me the same identical deal that I am assured that a competitor of mine has.

Q. Do you relate that to inventory control that you refer to in Paragraph 6?

A. That is part of inventory control, yes.

Q. As a single store operator, before you became a chain operator, Mr. Palmer, didn't you have complete inventory control?

A. Did I have complete inventory control?

Q. Yes.

A. I guess it is as complete as can be. I don't imagine anyone has complete inventory control.

[fol. 1103] Q. Did you find that as you grew larger and got into a four or five store operation that your problems of inventory control became greater?

A. Yes.

Q. Is that why you built your warehouse?

A. No.

Q. What was the reason that you built your warehouse?

A. Well, I didn't build the warehouse, I am leasing the warehouse. The reason was to try in a better way to compete with existing competition.

Q. How did the leasing of that warehouse enable you better to compete with existing competition?

A. Well, we are now able to buy larger quantities. If we want a car, we are on a spur track. If we could handle a carload of something we can buy a carload direct the same as our competitor can and try to stay competitive.

Q. When you say, "a carload of something," what are you referring to?

A. I am referring to dry foods and paper goods, canned goods. Grocery items, staple items, of course.

Q. And you feel this gives you a competitive advantage over the Shop Easy Store which your Montrose Store competes with?

A. Over a store of that size I would say yes.

Q. Does it give you a competitive advantage over this [fol. 1104] Trade Rite Store that you mentioned?

A. Yes.

Q. Would it give you a competitive advantage over this Country Store that you mentioned?

A. Yes.

Q. Tumble-In?

A. Yes.

Q. And the Thrifty Shopper?

A. I can't say for Thrifty Shopper because I am not sure how many units they have. That is a new market and kind of a hush-hush setup. I don't know how they operate.

Q. Does this give you a competitive advantage over every single store operator?

A. No.

Q. Why is that?

A. Well, there are some very large single units that buy the same way. The stores that you have mentioned happen to be what are commonly called the poppa and momma class. But there are some awfully large single operators also.

Q. That is any single operator operating a large supermarket can do just as you do with a warehouse; is that correct?

A. That's correct, to the best of my knowledge.

Q. When did you lease this warehouse?

A. 1961, I believe.

[fol. 1105] Q. Prior to that time you didn't bother to lease a warehouse?

A. No.

Q. Although you had a large supermarket operation and could have done so; is that correct?

A. Yes.

Q. Looking at your Paragraph 6 again, Mr. Palmer, Shopping Bag had a warehouse before the merger, did it not?

A. Yes.

Q. And Von's had a warehouse before the merger?

A. Yes.

Q. Can you tell me in what respect the merger of Von's and Shopping Bag gave them an advantage over independents and small chains in terms of inventory control that they did not have before the merger?

A. Well, the words "inventory control" I think is being

used wrong. It is not the way I meant it at the time. I will have to go back to the same thing I said before.

The man that can buy ten is going to get a better break than the man that can buy one. I am referring now to non-dry grocery items. I mean this has nothing to do with Certified, Spartan or Orange Empire. I am referring to actual experiences that I have had.

I have been on the produce market for years, daylight in the morning, and I used to know Von's buyers and Shop-[fol. 1106] ping Bag's buyers well. If we both happen to have, to cite an example, corn on an ad and Von's needed corn, all the corn that was in the market, they would get all the corn that was in the market. I will have to go out and grow my own or buy it back from them. And the same thing happens in the fresh meat buying. If we both happen to hit the same item the same week, which is common in this business, because corn is cheap everybody knows it, and when beef is cheap everybody knows it and there is no secret between one operator and another.

But maybe I am talking too much, but you got me started.

Q. No.

A. If Von's had 30 stores or 40 stores and Shopping Bag had 28 stores, then 28 stores can't control an entire output of corn in the Los Angeles Market whereas 70 or 75 stores can really put a dent in it. Now, where does that leave a fellow with four or five stores that needs corn for his customers? That's all I am trying to say.

Q. That is what you mean in Paragraph 6?

A. Words to that effect, yes.

Q. Joe Goodnight, whom you say you know, has given an affidavit in which he says that a single store operator, or the small chain can do better in the purchase of produce and meat than the large chain because he can wait for the [fol. 1107] break in the market in the case of produce and be more selective in quality and he can do the packers a favor by buying small quantities that a packer can't sell to a chain. Would you disagree with that?

A. Partially, yes. It is two different situations we are talking about. As Joe pointed out, if someone has four or five boxes of apples, that, naturally, Von's couldn't make a pie with that many boxes of apples. He would be glad to

take them off his hands. He might give them a quarter or so to move them. But that isn't where the volume lies, in these odds and ends. I might add that Joe just changed produce buyers, also.

Q. Are you through?

A. Yes.

Q. Joe said that with respect to meat the small single store operator or the small chain can often pick up good quality at a better price because he can help the packer with his shorts. Has that been your experience?

A. Well, with the shorts, yes. As long as you define it.

Q. The single store operator doesn't have to buy in a quantity, does he?

A. Well, now, I am not—In the first place, I don't profess to be a criterion. This is just my opinion.

Joe might be right, anybody might be much more cor-
[fol. 1108] rect than I am. But this is just my opinion today and I think that is what you called me down here for.

Q. This is all we want, is your opinion.

A. I am not speaking as a single store operator and I am not speaking as a major chain operator. I am speaking as a fellow in between.

That to cite the ad item again, if we have corn, we will go back to that, on an ad we will need three or four hundred crates of corn. Well, if we happen to bump into a major chain that is on the same ad these three or four hundred won't be available. If a single store operator needed three or four, or two or five, I am sure he could get those. But I am speaking as a man that is right in the middle.

Q. You are speaking as a man in the middle but you started out as a single store operation and I gather you went down to the produce market yourself during that time; isn't that right?

A. Why, yes. I would say that would be true of 90 per cent of the operators starting out as a single store operation.

Q. And you were able to get good quality produce at a fair price, were you not?

A. Certainly.

Q. As good a price as any of the chains?

[fol. 1109] A. I wouldn't say that, no. You said a fair price.

Q. Do you have any basis for concluding that the chains were getting a better price than you when you were buying as a single store operator?

A. When I was buying, yes.

Q. What is the basis for that?

A. Well, Just out and out I would either see bills or I would be told by a salesman. Well, I was paying $5, for instance, and I was buying two or three boxes of something and I would argue with a fellow that I wanted a quarter or a half and he would show me bills, "So and so chain paid four and a half. You are only paying a half more. They took 300 and they are paying four and a half."

Q. When you became a single store operator buying three or four cases were you able to inspect the quality and did you inspect the quality?

A. Yes. I did then and still do. The same as they are able to.

Q. You said you were acquainted with the Von's and Shopping Bag buyers and they were buying in large quantity, were they not?

A. Yes.

Q. Is it your opinion that the person buying in the large quantities of that type suffer more spoilage?

A. No. They have real capable buyers. All that I [fol. 1110] have ever run across knew their business real well.

Q. And they inspect the produce very carefully when they buy in these large quantities; is that your testimony?

A. They inspect a certain number of packages in a lot that they are buying and the supplier knows that the merchandise has to be the same as he has shown otherwise back it comes. That is my opinion.

Q. That is based on your study of the industry?

A. That is based on my time in the industry.

Q. Do you feel that the investment you have in your bowling alley gives you a competitive advantage over other grocery concerns in the area which don't have bowling alleys?

Mr. Hughes: We object to the question because it is irrelevant.

The Witness: No.

Mr. Alsup: Q. Do you have any idea whether or not Von's gets a better return on its investment in Jerseymaid than it would have if it had an equivalent investment in bowling alleys?

A. No, I couldn't answer that. I have no idea.

Q. What dairy concern do you do business with?

A. Knudsen, Manfull and Challenge.

Q. Are Knudsen and Challenge well advertised brands?

A. Yes.

Q. Do they have equal public acceptance, in your opin-
[fol. 1111] ion, to that of Jerseymaid?

A. Yes.

Q. Is there anything that Jerseymaid can do for Von's that Knudsen and Challenge can't do for you?

A. Well, I am not at all familiar with Jerseymaid's operations so I wouldn't be the one to answer that.

Q. The price at which you sell your milk is fixed by state law; isn't that correct?

A. Yes.

Q. And the price at which Von's sells Jerseymaid is fixed by state law?

A. Yes.

Q. Have there been any of these milk depots opened in your areas?

A. Yes, there has.

Q. Has that injured you from a competitive standpoint?

A. Not to any great extent, no.

Q. These milk depots can sell milk cheaper than the grocery stores; isn't that right?

A. I believe if they have produce on the same premises they can, otherwise they would have to maintain the state minimum.

Q. Is that your understanding?

A. Yes.

Q. If you will read Paragraph 9, Mr. Palmer, of your
[fol. 1112] statement, please. Have you read it?

A. Yes.

Q. I will ask you to look at a document which has heretofore been identified as Fairbank Exhibit No. 1. Is that one of the defendants' exhibits which was shown to you before you signed this statement?

A. I couldn't say, really.

Q. Did you see any defendants' exhibits before you signed this statement?

A. Yes.

Mr. Alsup: Counsel, can we stipulate that this is one that was shown to him?

Mr. Hughes: Yes, this is.

Mr. Alsup: Q. Will you accept that stipulation, Mr. Palmer?

A. Yes.

Q. You will notice in your Paragraph 9 of your statement, Mr. Palmer, no reference is made to the market share of the top 3, 4 or 5, or what happened to it in the years referred to. Isn't that correct?

A. Yes.

Q. Can you think of any reason why the top 3, 4 and 5, which you were shown on this exhibit, were ignored in your Paragraph 9 and reference was made only to the top 8, 9, 15 and 20?

[fol. 1113] A. The top 4 and 5 in this area?

Q. Will you look at the heading of the exhibit, Mr. Palmer?

A. No, I can't say why.

Q. Was this statement prepared and exhibited to you before you were talked to?

A. No.

Q. It was after?

A. Yes.

Q. After it was prepared it was sent to you and you made some corrections on it and sent it back and it was retyped; is that correct?

A. No. It was brought out in person.

Q. Looking at this chart, Mr. Palmer, would you agree, based on your continued study of the retail grocery industry, with what is shown in this chart that the share of the top 5 declined between the years 1952 and 1960?

A. According to the chart it declined.

Q. You were willing to accept the chart as authority for your statement as to the top 8, 9, 15 and 20, were you not?

Mr. Coyle: You are assuming that is not in the statement, Mr. Alsup.

Mr. Alsup: Q. The statement says you are in agreement with the chart?
[fol. 1114] A. Yes.

Mr. Coyle: It does not. It says he is in agreement with the showing of the chart, the top 8, the top 9, the top 15 and the top 20. It doesn't say whether he is in agreement or disagreement with the showing of the chart as to the top 3 and top 4.

Mr. Alsup: Q. Do you accept counsel's statement as your own, Mr. Palmer?

Mr. Coyle: I am not making his statement, I am stating what Paragraph 9 says.
Mr. Alsup: I am asking Mr. Palmer.

Q. Do you accept that statement?

Mr. Coyle: Read Paragraph 9. He doesn't have to accept my statement. Paragraph 9 says what it says.
The Witness: Well, Paragraph 9 was taken from charts that were shown and also from personal readings and experience. Like I say in Paragraph 9, that I do think the charts are right.

Mr. Alsup: Q. Do you think they are right as to the top 3?
A. Well, I haven't studied the top 3.
Q. Do you think the chart is right as to the top 4?
A. Well, I would say what is on the chart is right because someone else studied it and worked out the chart. I would say offhand that the chart is correct.
[fol. 1115] Q. Would that conform with your understanding based on your continued study of the retail grocery industry?
A. My study of things in this type of understanding is based on charts and documents such as these charts.

Q. And you would agree then that the share of the top 3 declined in the period 1952 to 1960; is that correct?
A. If that is what the chart shows I would agree with it, yes.

Q. And the share of the top 4 declined between 1952 and 1960; isn't that right?
A. That's also shown on the chart.

Q. Does that conform with your continued study of the retail grocery industry as is referred to in Paragraph 9?

A. You mean as of this time?

Q. Yes.

A. I couldn't say now. I couldn't say whether they have continued to drop or have increased, without further checking.

Q. But based on your study, between the years '52 and '60 you would agree that that is a correct reflection of a drop in the market of the top 3, 4 and 5; is that correct?

A. That's correct.

Q. Based on your continued study of the industry, Mr. Palmer, can you testify whether or not the companies which made up the top 20 in 1950 were the same ones which made [fol. 1116] up the top 20 in 1960?

A. No, I couldn't say offhand.

Q. Could you say that there are some in the top 20 now who weren't even in existence in 1950?

A. Yes.

Q. Which ones?

A. Again I couldn't say offhand.

Q. Would you say Hughes?

A. It could be possible.

Q. Would it be possible on Shoppers?

A. Again I would just be guessing.

Q. Based on your continued study of the industry in this area can you tell us whether or not the top 5 in 1950 were the same companies that were the top 5 in 1960?

A. No, I couldn't say right offhand if they were or weren't.

Q. Looking at that chart again, Mr. Palmer, and based on your continued study of the industry in this area, would you agree with what is depicted there, that between 1958 and 1960 the market share of the top 20 declined?

A. This chart wouldn't give an exact answer to that either.

Q. I want your knowledge based on your study of the industry. Do you know whether or not the share of the top 20 declined between 1958 and the middle of 1960?

[fol. 1117] A. I would say, no, it did not decline.

Q. So you would say the chart is wrong?

A. Yes, that is my opinion.

Q. So when you state that you were in agreement that this exhibit showing in the period 1950 and 1958 the market share of the 8 largest chains increased, you are accepting only a part of the chart; is that correct?

A. You said the entire top 20.

Q. No. I am talking about the market share of the top 20, the very top line on this chart.

A. Well, this chart shows a decline for '58 to '60, yes.

Q. Based on your continued study of the industry would you believe that is correct?

A. Yes.

Q. And the chart shows a decline between 1958 and 1960 of the top 15; isn't that correct?

A. Correct.

Q. And based on your study would you agree that is what occurred?

A. Based on the chart, yes.

Q. I want your knowledge based on your study of the retail grocery industry.

A. I can't answer a question like that just out of a clear sky. I can probably in my own office answer you but [fol. 1118] not here.

Q. Did you have something to refer to in your office when you agreed to Paragraph 9 of your statement?

A. I don't recall whether I referred to anything or not, or I just took the chart for granted.

Q. Let us turn to another problem. In Paragraph 11, Mr. Palmer, it states that you would testify that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair and Food Giant were among the leading firms in the area; is that correct?

A. Yes.

Q. Are those the major firms which you refer to in the third line of Paragraph 15 of the same statement?

A. Well, not necessarily these individual companies merging, but merging with maybe out-of-the-area companies or it could be such a thing as an inter-area merger.

Q. I suppose anything is possible. Are you conjecturing and speculating at this point?

A. No. I am referring—Well, to be more specific, the Alpha Beta merger with the Acme Stores. That is from one coast to another.

Q. The Alpha Beta merger with Acme occurred after the merger of Von's and Shopping Bag, did it not?

A. Well, again I wouldn't know right offhand. I would have to check that.

[fol. 1119] Q. Prior to its merger or acquisition of Alpha Beta Acme had not done business in this area; is that correct?

A. That's correct, to my knowledge.

Q. This was the means by which it entered business in the area; is that correct?

A. Yes.

Q. Is Acme also known as American Stores?

A. I couldn't say.

Q. Do you know whether it is the fourth largest chain in the nation?

A. I believe it is.

Q. Do you know whether the Department of Justice has challenged that merger or acquisition in any way?

A. I have no idea.

Q. You refer to Acme entering the area by acquiring Alpha Beta. Paragraph 15 says that if this merger is allowed there will probably be subsequent mergers between and involving the other major chains. There must have been some basis for your conclusion when you used the word "probably." I would like to know what you had in mind.

A. Well, probably at the time Fox was dickering with different Eastern corporations to merge with or sell out to.

Q. Fox at the time was in bankruptcy, was it not?

A. 1960?

Q. You made this statement in 1962, did you not?

[fol. 1120] A. Well, yes. But I am still not sure whether Fox was in bankruptcy or not at the time.

Q. Aren't you sure that Fox was in bankruptcy in 1962?

A. No, I am not sure. What part of '62 was it?

Q. It is my understanding that it was in Chapter X and XI through '62 and part of '61.

Mr. Alsup: Was it not, Mr. Bates?

Mr. Bates: Yes.

The Witness: That could be so. Like I say, I am not too familiar with dates. But my thinking along that line was that if this is allowed and people can merge and go on and

on merging it will end up with three or four major operators controlling the entire market. And that is still my opinion.

Mr. Alsup:

Q. Do you have any knowledge whatsoever that Ralphs has any intention whatsoever of merging with any other company?

A. No.

Q. Do you have any knowledge whatsoever that Safeway has any intention whatsoever of merging with any other company doing business in this area?

A. No, no.

Q. If I ask you the same question as to Market Basket would your answer be the same?

A. Yes.

Q. If I ask you the same question as to Thriftimart [fol. 1121] would your answer be the same?

A. It would have to be the same. But that isn't what I was referring to in the original statement.

Q. No. What you were referring to is that if this merger is allowed there probably will be subsequent mergers between and involving the other major chains. And I am asking you to tell me what other mergers will probably occur in this area between the other major chains and the basis for that conclusion.

A. When I made that statement I had no definite positive companies in mind.

Q. You were just speculating; is that correct?

A. You can call it that.

Q. Would you call it that?

A. Well, here I would.

Q. You have no knowledge at all to speculate that Alpha Beta might merge with another company doing business in this area, do you?

A. No.

Q. Or Mayfair?

A. No.

Q. Or Food Giant?

A. No, I have no knowledge on any of them.

Q. In that same paragraph 15 you state, Mr. Palmer, that this merger of Von's and Shopping Bag is a major [fol. 1122] stride in increasing the market share of the

large chains. My question to you is: How much did this merger increase the market share of Von's?

A. Well, you understand "market share" on the basis of your Paragraph 9, do you not, Mr. Palmer——

A. Yes.

Q. —to mean a share of the total grocery sales in this area made by a chain?

A. Yes. That is another thing that I can't answer off the top of my hat.

Q. You state here it is a major stride in increasing the market share.

A. And I probably have the figures in my office to show that it's a major share.

Q. Pardon?

A. I probably have the figures in my office that shows it's a major stride. That shows the actual amount of the market share they picked up. I can't answer that right here.

Q. Did you look at those figures in your office before you signed this statement?

A. Yes.

Q. Would it refresh your recollection at all if I suggested that Von's-Shopping Bag's market share in 1960 was somewhat less than 4 per cent?

[fol. 1123] A. Again I couldn't answer without looking it up.

Q. Would you regard 4 per cent as a major stride?

A. Well, added to what they already had it would be a major stride.

Q. Assume that Von's had 4 per cent and assume that Shopping Bag had less than 4 per cent, would you say that the merger of Von's and Shopping Bag was a major stride in increasing the market share of the large chains?

Mr. Coyle: He has already answered that question.

Mr. Alsup: Q. Will you answer the question?

Mr. Coyle: Read back your previous question and his answer.

Mr. Alsup: He can answer the question again. I don't think he has answered it.

Would you read the question, please.

(The reporter read the pending question.)

The Witness: Yes, I would.

Mr. Alsup: Q. This merger of Von's and Shopping Bag didn't increase the market share of Safeway in any way, did it, or of any other concern in the area other than Von's; isn't that right?

A. I would say that's correct.

Q. What do you understand the words "tend to create a monopoly" to mean, Mr. Palmer?

A. Tend to create a monopoly means just as it states. [fol. 1124] Q. Pardon?

A. To dominate whatever line of business the company happens to be in. If there is no competition then there is a monopoly.

Q. How many grocers, independent grocers, separate grocery concerns are doing business in the Los Angeles metropolitan area, consisting of Los Angeles County and Orange County, if you know?

A. Well, there is a great many. I haven't got the exact figure.

Q. Would you say several thousand?

A. Yes.

Q. In Paragraph 13 of your statement you state that you would testify that you face very vigorous competition from Von's. Is that a correct statement?

A. Yes.

Q. Has that competition increased or decreased since the merger?

A. Increased.

Q. In Paragraph 15, however, you state that this merger will have the effect of substantially lessening competition. Would you explain the difference between 15 and 13?

A. Well, 13 states that I faced vigorous competition from Von's on a competitive market basis. 15 also refers [fol. 1125] to competition, but the way it was meant, and probably still reads, that the competition would be lessened by lesser outlets, lesser units, not by actual physical lessening of competition in price matters and so forth.

Q. That is you testify with respect to Paragraph 13 that you have faced more vigorous competition from Von's since the merger; that is correct, isn't it?

A. That is correct.

Q. And when you say in Paragraph 15 that this merger of Von's and Shopping Bag will have the effect to substantially lessen competition, what you are saying is that there may be fewer grocery stores in the area in the future?

A. Yes.

Q. And yet you haven't been able to list any in your area, have you?

A. Well, no, not specifically by name and address, no.

Q. Do you know any grocery stores that have gone out of business since the merger?

A. Oh, I have known grocery stores that went out of business before the merger and after the merger. They will always be going out of business.

Q. And they will always be entering the business, won't they?

A. That's right.

Q. And many have since the merger, haven't they?

[fol. 1126] A. I can say so, yes.

Q. In Paragraph 14, Mr. Palmer, you state you would testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. Which ones did you have in mind when you made that statement?

A. Well, Fox was one, the Mayfair chain is another. These are things that don't come to me right here offhand either. These are names that are—that I can't recall right offhand.

Q. Did you recall them when you made the statement?

A. Yes.

Q. You had some documents before you?

A. Yes.

Q. What were those documents?

A. Well, trade journals, trade papers and so forth. Probably a little more at ease there than I am here and could think a little straighter.

Q. You referred to Fox. From your study of the industry, Mr. Palmer, isn't it correct that Eddie Fox started out in 1954 after leaving Mayfair to build a giant chain?

A. Yes, that is what I have heard.

Q. And that is what you have read, isn't it?

A. Yes.

Q. And he made a number of acquisitions, did he not?

A. Yes.

[fol. 1127] Q. In your reading of the trade papers didn't

you ascertain that the reason for his bankruptcy is that he expanded much too rapidly with inadequate capital?

A. Yes.

Q. You referred to Mayfair. Have you read that Mayfair has made acquisitions in this Los Angeles metropolitan area since 1948?

A. Yes.

Q. Have you read that Mayfair has sold stores since 1948?

A. Yes.

Q. If I should suggest to you that Mayfair has sold more stores in this area than it has bought would you agree with that conclusion?

A. You could be right, yes.

Q. You earlier testified that Von's Stores were for the most part located in the west and south; isn't that right?

A. Right.

Q. And the Shopping Bag Stores were for the most part located in the north and east; isn't that right?

A. For the most part, yes.

Q. Thinking of the major chains in this area can you think of any that could logically merge without having a large number of overlapping store sites?

[fol. 1128] A. Well, that is also pretty hard to answer on the spur of the moment without maps and so forth to refer to.

Q. From a logical standpoint you would agree that Safeway——

A. I would agree logically, yes, that you are right.

Q. It is not likely for other major chains to merge where they would have a great many overlapping store sites. That wouldn't be good business, would it?

A. Well, now, overlapping store sites have almost become a thing of the past, like gas stations. There is hardly such a thing as an overlapping store site any longer. As long as they are not in the same parking lot they cease to be overlapping. So that is kind of hard for me to say what their thinking would be on it.

Q. Based on your experience in the industry, your reading and your continued study, would you say that the average housewife in Los Angeles and Orange Counties has a wide variety of different stores from which to choose in deciding where she is going to shop?

A. Very much so.

Mr. Alsup: I have no further questions.

(A short recess was taken.)

Cross-examination.

By Mr. Hughes:

Q. Mr. Palmer, your stores are all up at the same [fol. 1129] section of Los Angeles County, except for the Thousand Oaks store, arn't they?

A. Yes, same general area.

Q. Why did you pick that marketing area to build your stores?

A. Well, at the time there were—It was lack of competition. There were no markets up there. So in moving from one location to another it was the influx of the population.

Q. Did you choose your store sites in areas where the population was expected to grow in the near future?

A. Yes.

Q. Is the population density around your Newhall store heavy at the present time?

A. No.

Q. Do you expect it to grow?

A. Yes.

Q. Was there much population in the vicinity of your Sylmar store when you went there in 1954?

A. No.

Q. Has that area grown since?

A. Yes.

Q. Would that explain why there was only one market, Phil's Market, prior to your entrance?

A. Yes, that's why.

[fol. 1130] Q. Mr. Alsup went into your Sylmar store figures from 1955 through 1962 and you had a growth from $500,000 to two million in 1961. Was most of this growth due to influx of population?

A. Yes.

Q. You stated that in 1962 your sales in that store were one and three-quarter million; is that correct?

A. Correct.

Q. Why did your sales drop? To what do you attribute that drop in that year?

A. Increase of competition. It will be farther off this year.

Q. That was Alpha Beta and Boy's?

A. Yes, that's it.

Mr. Alsup: May we go off the record a moment?

Mr. Hughes: Sure.

(Discussion off the record.)

Mr. Hughes: Q. At the time that Shopping Bag came into the Sylmar area in '58 or '59 the population was still expanding rapidly; is that true?

A. Yes.

Q. You mentioned this Strathern Shopping Center and you stated that it was not exactly the type of shopping center you had in mind. What type of shopping center was that?

A. Well, it's not an existing shopping center. It was [fol. 1131] a proposed shopping center out in the Simi Valley. This is also in Ventury County. Does this have anything to do with this?

Q. In Ventury? I will strike it.

Mr. Coyle: I will object to all the questions on the Strathern Shopping Center.

Mr. Hughes: I move to strike all of that previous testimony on the Strathern Shopping Center.

Q. Mr. Palmer, you mentioned your inability to get a deal from a bakery. Do you recall that statement?

A. Yes.

Q. Can you give us the details behind that?

A. We are also in Ventura County again.

Q. We will strike the whole thing. Do you know if Von's is in the bakery business in any way?

A. Yes, I believe it is my opinion that they are.

Q. What do you know about their bakery operations?

A. Well, they have both their Confection line and in the former Shopping Bag Markets they maintain the Van de Kamp bakery along with their own Perfection bakery. And to the best of my knowledge the newer Von's Stores are also using Van de Kamp and their own Perfection bakery.

Q. Von's does not operate Van de Kamp Bakeries?

A. Do they operate Van de Kamp Bakery?

[fol. 1132] A. The bakery itself.

A. No, not to my knowledge. They are operated the same as all Van de Kamp's, independently.

Q. But this Perfection bread you mention, is that made by Von's?

A. In my opinion it is their own.

Q. Do you believe that Von's has any advantage in baking their own bread?

A. Well, yes. To the point of any bakery in the retail baking industry that is bound to show a profit to stay in business. I don't believe that they can do anything with their own bakery that competition can't meet or stay with. That is my honest opinion.

Q. You testified that at your warehouse you had carload deliveries of some dry grocery products. Where were these carload deliveries from, from what suppliers?

A. Well, Proctor and Gamble—You want specific manufacturers?

Q. That's right.

A. Proctor and Gamble, Butter Kernel Candy Company of Minnesota, Vanity Fair Paper Corporation, New Jersey I believe.

Q. Any others?

A. Well, you are talking specifically of rail cars now, or truckloads?

Q. What about truckloads?

[fol. 1133] A. Well, there are numerous truckloads.

Q. Are these carload lots ordered through Spartan or Certified?

A. No, they are ordered direct.

Q. Why did you order them direct?

A. Well, to obtain the price advantage over the Spartan or Certified price.

Q. You can get a price advantage over Spartan or Certified's price?

A. Yes.

Q. Do you assume that all chains can get this when they order direct?

Mr. Alsup: I object to the form of the question on the

ground that it calls for a conclusion and no foundation has been laid.

Mr. Hughes: Q. To your knowledge do other chains get this advantage when they order direct?

A. Yes.

Q. On a carload of Proctor and Gamble soap products?

A. Yes.

Q. Could you estimate how much you would save by ordering direct rather than through Spartan or Certified?

A. Well, the saving amounts to approximately two per cent of the cost of the car.

(Discussion off the record.)

[fol. 1134] Mr. Hughes: Q. Mr. Palmer, in your testimony you referred to shorts in meats and the ability or inability of a chain of your size to purchase these shorts at a savings. Do you ever purchase these shorts yourself in meat?

A. No.

Q. Why don't you purchase them?

A. Well, usually the quantity isn't sufficient to do us any good.

Q. You mean too large or too small?

A. Too small.

Q. I would like to refer again to Fairbank Exhibit 1. Would you observe on that the time at which it begins and which it ends for any line for the top 20, the year?

A. The year that it begins? 1950.

Q. Through when?

A. Through 19 approximately '60. It doesn't go all the way over. 1950 through '60.

Q. Can you explain that dip in 1959? Can you recall the marketing conditions in 1959 that would affect the top chains?

A. Yes. There was—The month of January, to the best of my recollection, the entire month of January, the greater part of February, there was an industry-wide strike by the clerks union which closed the greater majority of contract bound markets in the entire area. There were some [fol. 1135] open but the great majority were closed.

Q. Do you believe that most of the top 20 chains in the area would have been contract bound chains?

A. Yes, I would say so.

Q. Does that help explain that dip in 1959?

A. Well, yes, it would explain. Well, I can't say definitely but I know the entire month of January and I believe the month of February were both affected by the strike. It would be two months.

Q. How long would it take for a chain to recover from that strike?

Mr. Alsup: I object to the question on the ground that it is confusing and ambiguous.

Mr. Hughes: Q. Do you understand the question?

A. How long would it take a chain to recover from a strike? Well, to get back in normal operation after the strike was settled I would say a matter of ten days to two weeks.

Q. How long would it take a chain to recover its lost sales, if ever?

Mr. Alsup: I object to the question on the grounds it is confusing, ambiguous and entirely speculative and no foundation has been laid.

Mr. Hughes: Q. Would you answer the question?

A. I couldn't say. I imagine each location would vary [fol. 1136] as to that.

Q. Referring to Paragraph 13 of your statement, you testified that you face very vigorous competition from Von's. Is this statement in the present tense?

A. Yes.

Q. In Paragraph 15 you state that this merger will have the effect of substantially lessening competition and tend to create a monopoly. Is that statement in the future tense?

A. Yes.

Q. Can you explain the difference between Paragraphs 13 and 15?

A. Well, in 13 I am referring to the stand that Von's has taken since the merger. They have cut prices, which I think is common knowledge. They sell under any other competition that we have. And 15 refers to the lessening of competition in the sense that there won't be as many to compete, not the price setting structure that I referred to.

Q. Is Von's price structure different now than it was before the merger?

A. Yes, it is my opinion that they are.

Q. In what way are they different?

A. They are lower. Their price structure, their percentage mark-up is lower than it was before the merger.

Q. Can you recall the time at which the chain changed [fol. 1137] its price policy?

A. I believe it was early '62, to the best of my remembering.

Mr. Hughes: This is a copy of the Los Angeles Times dated July 13, 1961, a two-page ad of Von's in part I, which is appearently Pages 18 and 19.

(The ad referred to was marked by the notary public as Palmer Exhibit No. 1 for identification, and is attached hereto.)

Mr. Hughes: Q. Mr. Palmer, do you follow the Los Angeles Times advertisements by retail grocery chains?

A. Yes.

Q. Do you recall this particular ad which is before you by Von's and Shopping Bag?

A. Yes, I have seen it.

Q. Do you recall giving me this newspaper?

A. No, I don't actually recall giving it to you, no.

Q. Do you recall the conversation which we had concerning the prices shown in this newspaper?

A. Yes.

Q. I direct your attention to several prices and I ask you to read the headline first, please, Mr. Palmer.

A. "Von's and Shopping Bag Slashes Food Prices Permanently. Over 1,000 Regular Prices Slashed. Now a New Low Price."

[fol. 1138] Q. Were these actually slashed prices?

A. Yes.

Q. Is this about the first time that Von's cut its prices?

Mr. Alsup: From when, Mr. Hughes?

Mr. Hughes: Subsequent to the merger.

The Witness: I couldn't testify as to what Von's did before the merger.

Mr. Hughes: Q. Did Shopping Bag do any price slashing such as this prior to the merger?

A. No.

Q. Are there any prices on this page which are actually below cost prices?

Mr. Alsup: If you know.

Mr. Hughes: Q. I direct your attention to "coffee."

A. Well, now this goes back to July of '61 and I would have to check prices at that time before I could answer.

Q. Or sugar?

A. I still couldn't say what sugar cost at that time.

Q. The cost of Perfection bread?

A. That I definitely couldn't say.

Q. Do you sell a loaf of bread for 19 cents?

A. No. Also at that time I don't recall what we were selling bread for. When I answered "No," I am talking of [fol. 1139] today's market. I don't really believe that the items that you are pointing out in there are below cost, but they are substantially below a normal mark-up, up until this time. As this shows, this shows the previous price and this shows the new price, and in my opinion this is the normal mark-up and this is the Von's-Shopping Bag mark-up.

Q. Have the prices risen since July 13, 1961?

A. Some commodities have, some have not.

Q. Do you believe Shopping Bag could have had these prices prior to the merger?

Mr. Alsup: I object to the form of the question on the ground that no foundation has been laid.

Mr. Hughes: Q. Did Shopping Bag ever have prices comparable to these prices prior to the merger?

A. I never recall seeing Shopping Bag's ad such as this, no.

Q. You cannot recall at this time the mark-up on these items?

A. Well, the mark-up, yes. I can't testify as to the cost of these items at that time. Like I stated, the normal mark-up on July 30th—or July 12th, excuse me, would be on this particular item this figure.

Q. Would you read the Figure?

A. 83 cents.

Q. On Giant Tide.

[fol. 1140] A. On Giant Tide. On the 13th, after they

slashed their prices permanently, they dropped the same item with the same cost to 79 cents.

Q. What was your response to this ad?

A. Well, we followed suit immediately because this started an industry-wide campaign that it was just the thing to do. Everyone followed suit.

Q. Has that campaign continued since that time?

A. Yes.

Q. How has it affected your business?

A. Well, volumewise, like I say, we followed suit and cut our prices. Volumewise I can't say that it has affected the volume greatly. But naturally it has affected the mark-up and our ability to maintain proper help and we had to cut our existing overhead accordingly to make up for this cut in profit.

Q. Does your store still operate as efficiently as before?

A. Well, you get used to anything. Not as efficiently as before, no. They operate.

Mr. Hughes: I would like to mark for identification a copy of the statement of Paul Palmer.

(The document referred to was marked by the notary public as Palmer Exhibit No. 2 for identification, a carbon copy of which is attached hereto.)

[fol. 1141] Mr. Hughes: That is all.

Redirect examination

By Mr. Alsup:

Q. Mr. Palmer, you were reading the trade papers pretty carefully in that period of July 1961, wern't you?

A. Yes.

Q. And you saw articles in the trade papers where Ralph's took credit for this price reduction, did you not?

A. No, I can't say that I did.

Q. Did you see any articles where Mayfair took credit for this price reduction?

A. Maybe I misunderstood. Are you talking of the trade papers or the advertisements in newspapers?

Q. The trade papers.

A. The trade papers, no, I didn't.

Q. Did you see any ads in the newspapers on or about this time where Ralph's took credit for being the leader in reducing prices?

A. Oh, yes, we all took credit for it the following week.

Q. Everybody did; isn't that correct?

A. Like I say, the following week we all took credit for it.

Q. And what is the normal mark-up, Mr. Palmer?

A. Dry grocery mark-up, is that what we are referring [fol. 1142] to?

Q. Well, you referred to a normal mark-up in referring to this exhibit. What were you referring to?

A. Well, specific items. Each item—not each item but a group of items carries a specific mark-up and a different group will carry a different mark-up. If I knew what you were referring to I could answer.

Q. What was the normal mark-up on a box of Tide?

A. About 14 per cent.

Q. And what was the mark-up that Von's reduced it to?

A. About six percent.

Q. What was the normal mark-up on the sugar that you referred to?

A. The mark-up on sugar is normally about six per cent.

Q. What was the mark-up that Von's reduced it to?

A. Very close to cost.

Q. What do you try to achieve as a gross profit on all of the items sold in your grocery store?

A. Eighteen per cent.

Q. Eighteen per cent? After this price reduction, which occurred in July of 1961, what was your overall mark-up?

A. Well, our latest shows barely over sixteen.

Q. What were your gross sales in 1961?

A. That I would have to just approximate. I couldn't [fol. 1143] give you exact figures.

Q. Would you give me an approximation?

A. In '61 we had two additional units. I would guess our sales were approximately $8,000,000.

Q. In '61?

A. Yes.

Q. What were they in '62?

A. '62 another approximation would be six and a quarter million.

Q. And if you added the sales of the other two units what would you estimate they would have been in '62?

A. In '62 we had the same number of units with the exception of this small one for the last six-month period. It would only be one small unit missing in '62 for a six-month period.

Q. Can you project the figures that would be comparable to '61?

A. I would say six and three-quarter million.

Q. What were your gross profits of your operations in 1961?

A. Well, like I said before 18 per cent, approximately.

Q. What were your gross profits from your operations in 1961?

A. To the best of my knowledge they were still around 18 per cent.

[fol. 1144] Q. And you indicated your gross profits in 1962 were roughly a little over 16 per cent.

A. Barely over 16, yes.

Q. What were your net profits in 1960?

A. This I would have to look up. I would just be guessing.

Q. Would you be guessing as to your net profits in '61?

A. Yes.

Q. Would you be guessing as to your net profits in '62?

A. Yes.

Q. Do you know whether your net profits in '62 were less than they were in '61, or more?

A. I would say they were less. I believe they were less. Again I would much rather give you facts than guesses.

Q. How about '61 compared to '60?

A. I believe about the same.

Q. So that this price reduction which occurred in July of 1961 ran for approximately six months in 1961 and didn't reduce your net profits in 1961 over net profits in 1960?

A. I can't answer you for the reason that you are asking because I have other interests other than the grocery business that all are figures in net profits. When you ask me what our net profit was for '61 and '62 I would have to [fol. 1145] have it broken down as to grocery operations before I could answer you so it would have any bearing on this case.

Q. When you said your grocery profits in 1961 were 18 per cent and your gross profits in 1960 were 18 per cent were you referring to these other business operations?

A. No, I was referring to the grocery business.

Q. You were referring to the grocery business?

A. Yes.

Q. So that this price reduction had no effect whatsoever then on your gross profits in 1961 as compared to 1960; is that correct?

A. I believe that to be correct, yes.

Q. You said that you cut overhead and became more efficient in order not to take a cut in profits; is that correct?

A. I said we cut the overhead. I doubt very much if we became more efficient.

Q. Do you know if other grocery concerns in the area cut their overhead and met the new prices that were then established?

A. Yes, I know they met the new prices and I read where they cut their overhead to absorb this.

Q. Do you feel that grocery profits were a little bit out of line prior to 1961, Mr. Palmer?

A. No, I don't.

[fol. 1146] Q. Can you think of any comparable business, Mr. Palmer, where a man can start out as you did, with the investment that you had, and in the limited time that you have been in business at your age build up the substantial net worth that you have earlier testified to?

A. That can't all be credited to the grocery business.

Q. What else do you attribute it to?

A. I have had very good luck in real estate.

Q. How much of it do you attribute to the grocery business?

A. A third.

Q. That is still a substantial amount, isn't it, Mr. Palmer? You have been a very successful grocer, have you not?

A. Well, that's—I am still here, let's put it that way.

Q. I can tell you this, there are a lot of lawyers and judges that would like to have built up that net worth, Mr. Palmer, in a comparable period of time. I think government counsel will stipulate to that.

From your reading of the trade papers at about this time in July 1961 did you observe a number of articles which

indicated that grocers were getting terribly concerned about the effect of the low prices of the discount houses?

A. Yes.

[fol. 1147] Q. Did you read a number of articles which indicated that it was necessary for the chains and single store operators to reduce their prices in order to meet this new competitive threat posed by the discount houses?

A. Yes.

Q. And by this price reduction which occurred there in 1961 did the chains and single store operators become more competitive with the discount houses?

A. Well, yes.

Q. You testified, Mr. Palmer, that you picked the various areas in which you located your stores because at that time there was a lack of competition in the area; is that correct?

A. That's correct.

Q. Was that true when you picked your Montrose store in 1960?

A. Yes.

Q. There were two Shopping Bag Stores within a mile of that location, were there not?

A. Yes.

Q. And there was at least one Safeway Store within a mile of that location?

A. Well, Safeway, call it a mile.

Q. That is what you called it before. Were there any other stores in that area?

[fol. 1148] A. No major markets, no.

Q. But you felt that you could come into this area and compete with Safeway and Shopping Bag, did you not?

A. Yes.

Q. And you did successfully, did you not?

A. Yes.

Q. And when you picked your Newhall location there was a Safeway Store only a mile and a quarter away; isn't that right?

A. Yes.

Q. And you felt that you could compete effect*lyve* with with Safeway in this area, did you not?

A. Yes. A very small Safeway Store, I should add. It is one of the older models.

Q. I think you testified that various of the Shopping Bag

Stores have a Van de Kamp concession in them; is that correct?

A. Yes.

Q. And that is true of a number of small chains and single store operators, they have Van de Kamp concessions, too, don't they?

A. Yes.

Q. And various single store operators and small chains have their own bakery, do they not?

A. Well, I couldn't testify one way or the other to [fol. 1149] that.

Q. Are you familiar at all with a Robert's Market in Sierra Madre?

A. No.

Q. So far as you know, the profit, if any, that Von's gets out of its bakery would be no greater than if had the same amount of money invested in a bowling alley, would it?

A. Well, I hope they get more out of a bakery than you can get out of a bowling alley.

Q. What did you say your investment was in your bowling alley?

A. Five and a half to six hundred thousand.

Q. You testified that you make a two per cent saving in buying a carload of products, say from Proctor & Gamble, over what you would have to pay if you bought that item through Certified; is that correct?

A. Yes.

Q. Have you computed how much of that two per cent savings is reduced by reason of the investment that you have in your warehouse?

A. Well, yes and no.

Q. Will you tell me how much "yes" and how much "no"?

A. Well, the turn-over is great on these items. It is the main reason for buying them in this quantity. Your money isn't tied up too long. So if you wanted to be right down [fol. 1150] to day by day or week by week you could probably show where the savings was meager, if any. But fast moving items that turn over in a short length of time we don't compute it that way.

Q. How much does your warehouse cost you in rent?

A. Oh, it's a very small amount, like $185 a month.

Q. You testified in Paragraph 13 that you were using the phrase that you face vigorous competition from Von's in the present tense; is that correct?

A. Yes.

Q. And this merger is more than three years old at this stage of the game. You have faced vigorous competition ever since the merger occurred, haven't you?

A. Yes.

Q. Have you seen any lessening of competition generally in this area since the merger?

A. No.

Q. After the price reduction referred to in the newspaper article of July 13, 1961, would you say that competition in this area generally increased or decreased?

A. I would say that it is about the same as it was.

Q. Doing business in this area, Mr. Palmer, are some very large national grocery chains, are there not?

A. Correct.

Q. One of them is A & P, which is generally recognized [fol. 1151] in the industry as the largest grocer retailer in the United States; isn't that right?

A. That's correct.

Q. And another national chain doing business in this area is Safeway Stores, and that is generally regarded in the industry as the second largest retail grocery concern in the United States; isn't that right?

A. That's right.

Q. And also doing business in this area is Acme, and that is generally regarded as the fourth largest chain in the United States, isn't it?

A. I believe you are right.

Q. Now having acquired the bankrupt Fox Stores, Food Fair is doing business in this area, isn't it?

A. Well, I couldn't testify to that because all I have heard is hearsay.

Q. You know that Mayfair, which does business in this area, also does business in several other Western states, doesn't it?

A. Yes.

Q. It is a much larger operation than Von's and Shopping Bag, isn't it?

A. I would say on the entire scope they are, yes.

Q. And also doing business in this area is Lucky, and that is generally recognized in the industry to be a multi-[fol. 1152] state chain, is it not?

A. Well, whether or not it is a franchise chain, I couldn't testify to that either.

Q. Don't you know from reading the various trade publications that Lucky does business all over California and in Washington?

A. Yes, I know they carry the Lucky name all over California. I don't know about Washington.

Q. So far as you know Von's is a local, regional chain; isn't that right?

A. Yes.

Q. Started by people in 1930 as a single store operation; isn't that right?

A. I don't know their entire background.

Q. But so far as you know they operate only in the Southern California area; isn't that right?

A. Yes.

Q. Do you have any idea what the financial resources and assets of A & P are?

A. No, not offhand.

Q. Would you say they are very substantially greater than those of Von's

A. Yes, I would.

Q. Would you say the same as to Safeway?

A. Yes.

[fol. 1153] Q. Would you say the same as to Acme?

A. Yes.

Q. I think, referring to Fairbank Exhibit No. 1, you indicated that the strike which occurred in January and February, you said, of 1959, explained the dip in the share of the market of the 20 largest chains. Do you recall that?

A. Yes. I didn't mean to say that explained the entire dip. I was asked what could have contributed to that dip and in my opinion that could have helped.

Q. Would you agree, though, that that strike wouldn't acount for the fact that their market share in 1960 was less than their market share in 1958?

Mr. Coyle: He has already answered that. He said he

didn't know how long it would take to recover from that loss.

Mr. Alsup: Let the witness answer that question. Would you read it, please.

(The reporter read the pending question.)

The Witness: I wouldn't know what to attribute that to. I wouldn't know how much they lost during that strike that they didn't get back or what other factors come into it.

Mr. Alsup: Q. I think you testified, did you not, that it might take them two weeks to get back to normal operations after a strike?

A. Yes, to normal operations, to get their stores back to normal operations. But I can also testify that we picked [fol. 1154] up a lot of volume that we never lost after the strike.

Q. You wern't closed down during that strike?

A. No.

Q. All of the major chains have to negotiate with Joe DeSilva's Retail Clerks Union, do they not?

A. Right.

Q. And this creates a problem for the major chains which is not faced by the single store operators; isn't that true?

A. No. To the best of my knowledge it is faced by everyone in the industry unless it be a family operated market. Anyone that hires help.

Q. But the single store operators were not closed down like the major chains?

A. This was union strategy. That didn't mean that they didn't have to sign the contract.

Q. But they remained open during the strike; isn't that right?

A. Yes.

Mr. Coyle: Let us get the record straight. Did the chains close their operations or was it the unions that went on strike? I heard that it was the chains that closed their operations down, that it was a lock-out.

The Witness: Yes, some chains were open. You can't say that they were all closed down.

[fol. 1155] Mr. Alsup: Are you testifying to a lock-out,

Mr. Coyle? If you want to say that I would like to cross-examine you.

Mr. Coyle: I want to get the facts on the record, though.

Mr. Vaughn: Your affidavit of Mr. DeSilva indicates that it was a strike.

Mr. Alsup: Q. You said, when you referred to a substantial lessening of competition in Paragraph 15 as a consequence of this merger that you were using the future tense because you thought there might not be as many to compete in the future; is that correct?

A. Yes.

Q. Have you, on the basis of your study, or any study that you have made, seen any lessening of the number of competitors in this area since the merger occurred in March 1960?

A. No. I have answered that before. No.

Q. So that you are looking into the long future and speculating about the possibility that there might be other mergers; is that correct?

A. Correct.

Mr. Alsup: I have no further questions.

Mr. Bates: I have no questions.

Mr. Hughes: Mr. Palmer, is it agreeable with you that [fol. 1156] we may submit your deposition without your signature, if it is agreed by counsel that it is correct?

The Witness: Yes.

Mr. Vaughn: It is agreeable with counsel for the defendants.

Mr. Bates: It is agreeable.

[fol. 1157] Testimony of Kenneth Richey

If subpoenaed to testify, Kenneth Richey would testify as follows:

1. He is the manager of Covina Farms Market, 731 North Grand Avenue, Covina, Los Angeles County, California. He has been in the grocery business for about 15 years and has managed Covina Farms Market for the past 6 years. Mr. Ray Okura is the owner of Covina Farms Market. In 1959

Covina Farms Market had gross sales of approximately $1,250,000. He would state that 1959 was an unusually good year, since the strike in January 1959 gave Covina Farms Market about $500,000 in extra business.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles Metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, Mr. Richey closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. Covina Farms Market subscribes to the "Black Book" and "Grocer's Weekly Guide," booklets similar to the "Key Services," and he follows the prices of all of the major chains appearing in those booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publi- [fol. 1158] cations, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store Age," and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles Metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He has observed that the decline in the number of grocery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result, fewer grocery stores are needed in the area to serve a comparable number of people.

5. He would testify that a single store operator cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big

chain store in his shopping center as an attraction to [fol. 1159] other tenants. As a result, single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

6. He would agree with Mr. Claude W. Edwards, president of Alpha Beta Acme Markets, Inc., a Von's industry witness, that it is far preferable to build your own grocery store from the ground up than it is to buy one already operating. However, he would testify that the cost of building and financing a new store is prohibitive, and to build one the size of the average large chain supermarket today would be impossible for an independent retailer with limited financial resources. With very few exceptions, only the large chains can build such stores today, and a single store operator generally gets started by buying an existing store.

7. The large chains have as much flexibility in buying supplies, in advertising and in pricing as do the single store operators. Almost every large chain belongs to Certified Cooperative and also buys direct. Therefore, they have every advantage of an independent and in addition they have their own direct buying organization. The large chains can and do advertise in local papers and in metropolitan papers, changing their advertisements and prices on short notice. An independent cannot be more flexible in [fol. 1160] advertising than this. As for flexibility in pricing items, he would state that if he does not meet the advertised prices of the chain store, he will not sell his groceries.

8. He would also state that in an effort to compete with the chains some single store operators must give credit, delivery services and other personal attention. However, giving credit is not within the ability of the average independent since the independent cannot get credit from his suppliers to cover his purchases and the extension of credit requires a great deal more capital than the average independent has at his disposal. Further, the cost of maintaining a truck and employing a delivery boy would necessitate higher prices. This might attract some customers but would lose others and the relative merits of such advantages are marginal.

9. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advan- [fol. 1161] tage over independents and small chains in terms of inventory control.

10. He would also testify that Covina Farms Market purchases from Certified Cooperative and Orange Empire Cooperative and this enables it to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such major perishable products as fresh dairy, meat, and produce items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution system. Thus, they have combined the advantages of the cooperative with direct purchasing and a highly developed distribution system. In addition, some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

11. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles Metropolitan area, he is in agreement with the picture presented in defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.5 per cent to 41.7 per cent; the market share of the [fol. 1162] 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these

figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

12. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

13. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair, and Food Giant, were among the leading firms in the area.

14. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consoli- [fol. 1163] dated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same lines and the stores are known as "Von's-Shopping Bag."

15. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

16. He would state that if this merger of Von's and Shopping Bag is permitted, there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distributions throughout the Los Angeles Metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantage over the small grocery. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition

and tending to create a monopoly in the sale of groceries and related products in the Los Angeles Metropolitan area.

[fol. 1164] SUPPLEMENT

P.1—Strike $500,000; insert $250,000.

P.3—Strike 1950; insert 1956.

Addendum—Mr. Richey has not noted a net decline in independent market operations in the Covina area with which he is most familiar, however, he is of the general belief that independent operations have diminished in the Los Angeles area.

P.4—Strike "He has observed—" and insert "He believes that the—"

P.5—Strike the phrase in the middle of the paragraph "Triple A financial status" and insert "substantial financial worth." Strike the next sentence, "As a result—centers" and insert, "As a result, single store operators cannot get locations in new shopping centers." Strike the words in the last sentence "by the chains with Triple A financial status" and insert "—between larger chains".

P.7—Strike the sentence "Almost every large chain—direct." and insert "Almost every large chain belongs to a buying cooperative."

P.8—Strike the sentence "However, giving credit—disposal." and insert "However, giving credit is not within the ability of the average independent since the billing period with suppliers is less than the billing period the retail customers would demand." You may leave in "The [fol. 1165] extension—disposal."

P.9—Strike from the last sentence "inventory control." and insert "flexibility in deliveries of merchandise."

P.10—Strike the word "dry" from the first sentence.

P.12—Strike "that they were—expansion" in the second sentence.

P.15—Strike 1958; insert 1956.

P.16—Strike "and tending to—area." in the last sentence and insert "among the chains and aggravate the status of the independent market operators."

[fol. 1166] Deposition of Kenneth K. Richey, taken on behalf of the defendants, at 433 South Spring Street, Los Angeles, California, at 9:00 A.M., Friday, April 19, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

Kenneth K. Richey, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Bates:

Q. Mr. Richey, would you state your present residence address for the record, please.

A. 18615 Greenhaven, Covina.

Q. How old are you, Mr. Richey?

A. Thirty.

Q. How long have you been in the grocery business?

A. 1947.

Q. Where did you first start?

A. Boy's Markets.

Q. In what capacity?

A. Box boy.

Q. How long did you stay there as box boy?

A. As a box boy about six months.

Q. Then relate your experience.

A. I became an apprentice clerk, worked for Boy's until [fol. 1167] 1952, a little over five years.

Q. What was your capacity with Boy's Market at the time you terminated your employment with them?

A. Journeyman clerk.

Q. Then where did you go to work?

A. Walker's Markets.

Q. In what capacity?

A. Clerk.

Q. What market did you work in?

A. It was on lower Azusa Road in Temple City.

Q. How long did you remain there?

A. I remained with Walker's organization for three years.

Q. What was your capacity at the time you terminated your employment with Walker?

A. Assistant manager.

Q. Then where did you go?

A. Covina Farms.

Q. When you commenced working for Covina Farms what was your capacity?

A. Manager.

Q. Is that the same job you have today?

A. Correct.

Q. What year did you start?

A. '56.

[fol. 1168] Q. You have worked there then approximately six years?

A. Six and a half.

Q. Mr. Ray Okura is the owner of that market, is he not?

A. That is correct.

Q. It is a corporation named Covina Farms Market, Inc.?

A. Yes.

Q. Does Mr. Okura take an active part in the business?

A. Yes.

Q. You work directly under his supervision?

A. That's correct.

Q. What is the nature of the business out there? Aren't you primarily a produce concern?

A. No.

Q. A produce market?

A. No. At one time it was strictly produce?

Q. At what time?

A. '55.

Q. Then did you put in meats and dry groceries?

A. Correct.

Q. When did you do that?

A. '56.

Q. What per cent of your business, volumewise, would you say is produce at the present time?

A. Oh, I would say about 20 per cent.

[fol. 1169] Q. What percentage would be dry groceries?

A. Sixty.

Q. And meat and dairy products the balance?

A. I beg your pardon?

Q. Meat and dairy products the balance?

A. Dry grocery—You are separating dairy from dry grocery?

Q. Yes.

A. I would say then it would probably be 55 per cent dry groceries and 25 per cent meat and dairy.

Q. Do you recall what month in 1956 you first started?

A. September.

Q. As near as you can recall, Mr. Richey, what was the gross volume of sales in the Covina Market in that year of '56?

A. For the total year?

Q. Yes.

A. We only had three months of operation with the grocery department and I was only there for a period of, it would have been four months in '56.

Q. Let us go to the year 1957, the first full year in which you were there, and give me an approximation of the gross volume that year.

A. I'd say the total gross volume was probably three quarters of a million.

[fol. 1170] Q. Under your management, and probably due to your efforts and hard work, you have seen a steady increase in the volume of that business since '56, haven't you?

A. We have had an increase, yes.

Q. In 1958 what would you say the volume was?

A. I would say approximately the same as '57.

Q. 1959?

A. There was a considerable increase because of the strike. I would say probably we did a million and a half that year. Also we remodeled and enlarged the store at the same time.

Q. What did the enlargement consist of?

A. Doubling the sales area.

Q. 1960?

A. About a million and a quarter.

Q. It dropped down a little bit after the strike?

A. Correct.

Q. Do you attribute the decline from a million and a half to a million and a quarter to the strike?

A. Well, there was one month there it was considerably larger. So it would be definitely the decline would be because of the strike.

Q. The 1962 gross is approximately $1,320,000, isn't it?

A. Approximately.

[fol. 1171] Q. Over the years as your volume of sales increased your profit also increased dollarwise, did it not?

A. Yes.

Q. Do you recall how much it cost Mr. Okura to remodel the building and enlarge it?

A. No, I don't. I don't know the actual cost.

Q. Do you know that when Mr. Okura started that business in 1955 that he invested approximately $15,000?

A. Yes.

Q. Do you know what the approximate net worth of the business was at the end of 1962?

A. Did you want that less what he owes on it or just the net worth?

Q. Yes, the approximate net worth.

A. I would say around a quarter of a million dollars.

Q. So that it would be fair to say that during the time that you have been managing the operation out there, from '56 to the present time, that it has been successful?

A. Yes.

Q. And it also would be fair to say that during all those years from '56 up to the present time that you have had an increase in the volume of sales and in the profits?

A. Yes.

Q. Mr. Richey, what do you consider to be the draw area for your store, in terms of miles from the location?

[fol. 1172] A. I would say about a five mile radius.

Q. Will you name for me those concerns in the grocery business that you consider to be your competitors in that five mile radius area?

A. Alpha Beta, Market Basket, Buy Fair, Food Giant, Safeway, Lucky, Von's, Sunrise, Ralphs, White Front, ABC, Moore, Center Market.

Q. Can you designate which one of these you have named is a single store operation or an independent?

A. Center Market. Oh, they are two units. Buy Fair has five.

Q. What about Moore?

A. I don't know how many units they have.

Q. More than one?

A. I believe so. It is a subsidiary of Thriftimart.

Q. What about Sunrise, is that more than one?

A. They have two units. Also Mayflower Markets.

Q. Mayflower or Mayfair?

A. Mayflower. They have two units.

Q. There are none of these that you list as competitors to Covina Farms Market which is a single store or an independent operation?

A. That's correct.

Q. What is the present area of your store, sales area? [fol. 1173] A. The sales area is approximately 7500 square feet.

Q. Prior to that you would say it was about 3250?

A. Approximately 3500.

Q. In your statement at one or two places you referred to a continued study of the retail grocery market that you made in the area. Has that study largely been in the area in which you are in business?

A. That is correct.

Q. It would be within this five mile area that you say is your draw area for the Covina Store?

A. Basically.

Q. What study have you made concerning the marketing conditions in that area?

A. Oh, we watch pricing, advertising, merchandising, area growth, shopping trends and habits, advertising.

Q. What publications do you refer to when you say you watch these things? Do you refer to publications that you read?

A. Local news and just general survey.

Q. Do you subscribe to any particular publications that afford you the information that you have just stated?

A. As far as I know there is nothing that gives you just a local picture. You could pick part of it out of the Bulletin, Grocers Journal, but there is nothing that deals specifically with a small area like that. It is more generalized. [fol. 1174] Q. You have made no study then, I take it, as to the marketing conditions, say down in Orange County?

A. Nothing other than what we read in the trade magazines.

Q. And the same was true of, say, the San Fernando Area?

A. Correct.

Q. And the Santa Monica area, the Long Beach area?

A. True.

Q. It would be fair then to say that you don't claim to have any special knowledge of marketing conditions in any other area except the five mile radius that you are working in at the present time?

A. Correct.

Q. Directing your attention to the year 1956, do you know the number of single store operations or independents in Los Angeles County and Orange County in that year?

A. Do I know the number?

Q. Yes.

A. No.

Q. Do you know the number of single store operations that were in your draw area in the year 1956?

A. Yes.

Q. How many?

[fol. 1175] A. Including our market there were four.

Q. How many were in that draw area in 1960?

A. Two.

Q. Including yourself?

A. Yes.

Q. And in 1962?

A. Still two.

Q. I believe we did not list by name an independent or single store operator.

A. You asked me the ones that I consider competitive. The single unit is J.O.B. Market.

Q. You don't consider J.O.B. to be a competitor of yours?

A. No.

Q. Is it within the five mile area?

A. Yes.

Q. Why don't you consider it to be a competitor?

A. Location, size, facilities.

Q. What is the size of the J.O.B. Market?

A. I would say it is around 5000 square feet, downtown area, inadequate parking.

Q. Are they engaged in the general grocery business?

A. Yes.

Q. Do they handle produce?

A. Yes.

[fol. 1176] Q. Do they handle meat?

A. Yes.

Q. And dairy products?

A. Yes.

Q. You have said to me that in the year 1956 that in the draw area of your store there were four independent single store operators, including your own, the Covina Farms Market.

A. That's right.

Q. You have also said to me that in the year 1962 there were two independents.

A. Single units.

Q. One of which is your own and the other is J.O.B. Market?

A. Correct.

Q. Who were the other two?

A. John Codd's. Codd's Market.

Q. Where was that located?

A. That was located—What is the name of that street?

Mr. Levinson: The main street in Covina.

The Witness: No, it is not the main street. College Street.

Mr. Bates: Q. How large a store was that?

A. About 5000 square feet.

Q. Do you know who owned it?

[fol. 1177] A. John Codd.

Q. Tell me, if you know, what happened to it. Did it close up or was it sold?

A. It was sold to J.O.B.

Q. Sold to J.O.B.?

A. Yes.

Q. And this is the J.O.B. you referred to before?

A. Correct.

Q. Is it the same store that they are operating now?

A. Same market.

Q. What other store?

A. Haig's.

Q. Where was that located?

A. On Citrus.

Q. Is that also in Covina?

A. Covina.

Q. How big an area was that?

A. Approximately 12,000 square feet.

Q. Did you consider them one of your competitors?

A. Definitely.

Q. Who owned that store?

A. Mr. Haig.

Q. Do you know what happened to it?

A. They sold it.

Q. Who did they sell to?

[fol. 1178] A. Fox.

Q. So that during the period from 1956 to the present the four independent operators that were in your five mile area, Covina Farms Market is still there——

A. Yes.

Q. —the Codd Market, which was sold to J.O.B., is still there——

A. Yes.

Q. —and Haig's Market, which was sold to Fox, is still there and operating?

A. Yes. But it has been sold a couple of times since.

Q. Who owns it now?

A. Center Market.

Q. I believe you previously told me that Center Market was a two-unit chain.

A. That's correct.

Q. Or a two-unit operation.

A. Correct.

Q. Then it is fair to say that during the period that you have been manager of the Covina Farms Market you know of no single operation that has just closed up and gone out of business.

A. There is nothing that has been closed up that hasn't been taken over by another operation.

Q. Then in your statement where you refer to the decline [fol. 1179] in single store operations, these facts that you have just related about the sale of these single operations is what you refer to as decline; is that correct?

A. That and the charts that I have seen on decline.

Q. What charts have you seen on the decline?

A. The ones that were shown.

Q. The ones exhibited to you by the Government attorneys?

A. That is correct.

Q. Are they the only charts you have seen that reflect the situation?

A. Other than trade bulletins.

Q. Did you ever compare the charts shown you by the Government with these other trade bulletins?

A. Just mentally.

Q. Particularly to which trade bulletins do you refer?

A. Grocers Bulletin. It lists weekly the new operations and ones going out of business.

Q. And then, of course, aside from what was shown on the charts exhibited to you by the Government you do not have any information about the decline in Orange County or the San Fernando area or in any other area except your own little five mile radius.

A. That's correct.

Q. Mr. Richey, have you, as manager of Covina Farms Market, made any effort to get into a shopping center?

[fol. 1180] A. We tried it once.

Q. When?

A. About four years ago we tried to get into a shopping center.

Q. What shopping center was it?

A. It was a location east of Ontario. I can't even remember the name of the street now.

Q. Do you remember the name of the center?

A. No, I don't.

Q. Has the center been built?

A. Yes.

Q. Who did you talk to?

A. The owner talked to the developer and the leaser.

Q. Mr. Okura talked to the——

A. Talked to the people.

Q. Is that in Los Angeles County or San Bernardino?

A. That would be in Los Angeles County. No, that is in San Bernardino County. It is just on the line.

Q. Aside from that, that is the only effort I think you said that was made to get into a shopping center?

A. That's correct.

Q. So far as you know none of the other single store operators that you were acquainted with in your area out there made any attempt to get into a shopping center, did they?

[fol. 1181] A. As far as I know personally?

Q. Yes. Do you have any information that Mr. Codd,

for instance—Do you know that Mr. Codd made any effort to get in a shopping center?

A. No, I don't know what Mr. Codd did.

Q. Or any others that you have named for me, you don't know that of your own knowledge?

A. No, I don't know that for a fact.

Q. Mr. Richey, in your statement you say in effect the major chains own their own warehouses and they have large trucking facilities and they buy direct from producers and deliver to their own stores in their own trucks. By reason of that this gives the chains advantages over independents in terms of, and I quote, "Flexibility in deliveries of merchandise." What is your basis for that statement?

A. It is basically they can get their deliveries when they want them, what they want, and they can return merchandise to their warehouses. They can transfer from one store to another on merchandise that doesn't move in particular areas.

Q. Doesn't Covina Farms Market belong to Orange Empire and Certified?

A. Yes, we do.

Q. Doesn't both Certified and Orange Empire own their [fol. 1182] own warehouses?

A. Yes, they do.

Q. And don't both of them have large trucking facilities?

A. Yes, they do.

Q. And both of them also buy direct from the producer, don't they?

A. That's correct.

Q. And both of them in their trucks deliver to the stores of all their members, don't they?

A. Yes.

Q. Will you explain to me wherein the chain stores have any advantage in that situation over the members who belong to Orange Empire and Certified?

A. We have to take our deliveries when they can make them. We cannot return merchandise without a penalty. If something don't sell you just have to keep it and move it.

Q. What is this penalty you refer to?

A. They have a charge for returned merchandise.

Q. Suppose the chain buys from a producer, stores it in his warehouse, moves it out to his store and that merchan-

dise doesn't sell and moves it back to his warehouse. What happens to that? In your opinion does he suffer a penalty because he can't sell specific merchandise?

A. Yes, he would suffer some, but not as much inasmuch [fol. 1183] as the merchandise would go onto a truck returning to the warehouse and possibly even to another store and never returning to the warehouse.

Q. You recognize, don't you, as a man experienced in the grocery business that the chains have considerable expense in running those trucks from the warehouse to the stores?

A. Definitely.

Q. Picking up unsalable merchandise and putting it back in the warehouse?

A. Definitely.

Q. What happens to it when it gets back in the warehouse, in your opinion?

A. In my opinion they would ship it to a store that could move it, a larger volume store, perhaps an area store that could move it.

Q. That is just speculation and assumption on your part?

A. That is an opinion.

Q. Those are the advantages that you say that the chains have over an independent operator?

A. That would be part of it, yes.

Q. What is the rest of it? I would like to have you list for me all the advantages that you can think of because of the ownership of warehouses, trucking facilities and the [fol. 1184] purchase from producers.

A. Delivery time—You are talking strictly in that area, of transportation and purchasing, or are you talking generally?

Q. Suppose you confine your answer to the five mile radius, which is the only area you say you have any information concerning.

A. On trucking? What field are you talking in?

Q. I am talking about your area now. You speak of these advantages that the chains have over independents who belong to certified and Orange Empire and I would loke to have you list for me all the advantages that you referred to in your statement.

A. They have an advertising advantage. They have, as I feel, trucking advantages, getting their delivery times,

the option of returning merchandise without as much penalty, or any penalty to the actual store. Labor advantage, I would assume, inasmuch as they can transfer help from one store to another.

Q. What is your basis for stating they have a labor advantage?

A. They can transfer help from one store to another.

Q. A single store operator doesn't need to do that under any circumstances because he doesn't have a second store; is that correct?

[fol. 1185] A. That is correct. There is no way to do it.

Q. Then why do you characterize that as an advantage?

A. If we have a slow week we've got all of our help and we have to pay them whether it is slow or busy. We cannot transfer them to another store to compensate.

Q. Mr. Richey, in Paragraph 8, I believe it is, of the statement you referred to the market shares of the top 9, 15 and 20 and so forth. You were shown a graph by the Government attorneys which we have designated in this hearing as Fairbank Exhibit No. 1.

Mr. Hughes: What paragraph is this?

Mr. Bates: In the statement that you furnished to me, Mr. Hughes, it is Paragraph 8. I don't know what the paragraph number is in the one that is being read by the witness.

The Witness: Would you repeat that, please, so I can find the paragraph?

Mr. Hughes: Let us go off the record.

(Discussion off the record.)

Mr. Bates: Q. Mr. Richey, are you reading from the only copy of the statement furnished you by the Government?

A. Yes.

Mr. Bates: I would like to have that marked for identification as Richey Exhibit No. 1.

(The document referred to was marked by the notary [fol. 1186] public as Richey Exhibit No. 1 for identification, a carbon copy of which is attached in lieu of the original.)

Mr. Bates: I would like to strike my question and rephrase it.

Q. Mr. Richey, please refer to Paragraph 11 in the statement. In that paragraph you refer to the market shares of the top 8, top 9, top 15 and top 20 grocery concerns in the metropolitan area of Los Angeles.

A. Yes.

Q. You were shown a graph by the Government attorneys which is marked Fairbank No. 1, were you not?

A. Yes.

Q. Had you ever seen that graph before it was shown to you by the Government attorneys?

A. No.

Q. Have you ever seen it since, until today?

A. No. Other than my copy, no.

Q. That is the only graph you ever saw, isn't it, depicting the market shares?

A. Actual graph, yes.

Q. You also in Paragraph 11 referred to a census report of the Bureau of Census of the Government. Did you ever see that report before it was shown to you by the Government attorneys?

[fol. 1187] A. No.

Q. Prior to seeing either of these charts or graphs had you made any investigation of the market shares of the major chains in the metropolitan area of Los Angeles and Orange County?

A. No.

Q. Have you made any investigation since seeing those charts and reports?

A. I have seen a supplementary chart but it wasn't authenticated.

Q. What chart was that?

A. It was a Times survey audit.

Q. Did you make a comparison with that chart and the one that you have before you which has been marked Fairbank's No. 1?

A. Yes.

Q. Were they similar or dissimilar?

A. They were similar.

Q. When did you see that chart?

A. About a month ago.

Q. Can you give me the date of the Times article that you examined?

A. No, I don't recall the date.

Q. You are referring to the Los Angeles Times?

A. Yes.

[fol. 1188] Q. You state this is about a month ago?

A. Yes.

Q. When were you shown Fairbank's Exhibit No. 1?

A. In December of last year.

Q. Were you given a copy of Fairbank's No. 1?

A. Yes.

Q. You retained a copy of Fairbank's No. 1?

A. Yes.

Q. It is on the basis of the retained copy that you compared the statements made in the Los Angeles Times; is that correct?

A. Yes, sir.

Q. Is that the only investigation that you have ever made concerning the relative market shares of the major chains?

A. I have seen other charts from time to time on market percentages?

Q. Are you in agreement with the information as shown on Fairbank's No. 1, based on your continued study of the market conditions in this area?

A. I would have to go along with it from what I have seen.

Q. You would agree then that the market share of the top three major chains in the metropolitan area decreased between the years 1952-1960, would you not?

[fol. 1189] A. The top three decreased.

Q. Yes.

A. I don't believe so.

Q. Will you please examine the chart, Mr. Richey? You say you are in agreement with it.

A. It decreased in '58 and then increased again.

Q. How about the top four?

A. It would be the same thing due to the strike.

Q. It also decreased from '52?

Mr. Hughes: I will object on the ground that the chart speaks for itself.

The Witness: Yes.

Mr. Bates: Q. And also the top five showed a decrease, did they not, between the years 1952 and 1960?

A. Yes.

Q. And the information that you saw in the Times article, to which you have referred, confirmed that decrease as to the top three, four and five?

A. The article I saw only showed current figures, it didn't have a projected chart back to the year of '50. It was only current figures.

Q. Did the current figures in reference to the top three, four and five, which you examined in the Times article, confirm the information that you see on the chart before you? [fol. 1190] A. It showed approximately the same percentage of business as the recent charts.

Q. Mr. Richey, in Paragraph 13 of the statement before you, you state, and I quote: "He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair and Food Giant, were among the leading firms in the area." Are those named firms the major chains that you refer to in Paragraph 16 of that statement?

A. Yes.

Q. In your Paragraph 16 you state in effect that if the merger between Von's and Shopping Bag is permitted there will probably be subsequent mergers between and involving the other major chains. What is your basis for that statement?

A. There already have been.

Q. Name them.

A. Food Giant-McDaniel's.

Q. You know, don't you, that McDaniel's went into bankruptcy and that such McDaniel's Stores that Food Giant acquired were received by purchase from the Bankruptcy Court?

A. That is correct.

Q. You know that is not a merger in the technical sense, don't you?

The Witness: Didn't we change that to "merger and [fol. 1191] acquisition"?

Mr. Levinson: I don't have a copy. Which paragraph is that?

The Witness: 16.

Yes, that was a purchase, not a merger. It was an acquisition.

Mr. Bates: Q. Do you have any information that Ralphs is going to merge with anybody?

A. No.

Q. Do you have any information that Safeway is going to merge with anybody?

A. No.

Q. Market Basket?

A. No.

Q. Thriftimart?

A. No.

Q. Mayfair?

A. No. However, Alpha Beta did merge with American Stores.

Q. Also in that paragraph, Mr. Richey, you state that the merger between Von's and Shopping Bag would accentuate the large chains' advantage over the independent operators. Would you please list those advantages that you say will be accentuated?

A. They are the same advantages as before, advertising, [fol. 1192] distribution, buying.

Q. Didn't those same advantages exist previously? Let us take Safeway. Didn't the same advantage exist as far as Safeway was concerned before the merger of Von's and Shopping Bag?

A. I would say so.

Q. Isn't that true of Ralphs?

A. I would say so.

Q. And Market Basket?

A. Yes.

Q. Alpha Beta?

A. Yes.

Q. Mayfair and the other major chains you have named? So it is fair to say then that the merger didn't have anything to do with that situation, isn't it?

A. Prior to the merger and since.

Q. The merger didn't have anything to do with the advantages that you say that the chains enjoy. They all had these advantages before the merger; is that true?

A. That's true. They just increase the percentage.

Q. In your area, your five mile radius area, since you started in 1956 there have been some new stores come into that area, haven't there?

A. Yes.

Q. And these new stores that have come in are competi-
[fol. 1193] tion with your market; isn't that true?

A. Yes.

Q. Is it fair to say that the competition in the five mile radius area of your store has increased between 1956 and the present time?

A. Yes.

Q. You haven't noticed any lessening of any kind in the vigor of competition in that area, have you?

A. That's correct.

Q. And also you have no information at the present time with reference to the lessening of competition in the San Fernando Valley or Orange County or any of these other areas?

A. Correct.

Q. Mr. Richey, the dictionary defines the word "monopoly" as, and I quote: "Exclusive possession of the trade in some commodity or the exclusive privilege of selling some commodity in a particular area." Do you accept that as a correct definition of the word "monopoly"?

A. It sounds reasonable.

Q. You use that word "monopoly" in Paragraph 16 of your statement. Was it in that sense that you used the word?

A. Not exactly in that sense. At present if the chains continue to merge and grow it could become a monopoly.

[fol. 1194] Q. Do you have any other definition of the word "monopoly" that you would like to give, other than the one that you concede is correct?

A. No.

Q. In your opinion, as an experienced grocery man in this area, do you believe that Safeway has or ever will have the exclusive right to sell groceries in the metropolitan area of Los Angeles?

A. I certainly hope not, but I don't believe so.

Q. Do you think Ralphs will ever have the exclusive right to sell groceries in the metropolitan area of Los Angeles?

A. No.

Q. How about A & P, do you think they will ever have the exclusive right?

A. No.

Q. Alpha Beta?

A. No.

Q. Of course, you do not hold the opinion that Von's-Shopping Bag would ever have the exclusive right to sell groceries in the metropolitan area?

A. The exclusive right, no.

Q. So isn't it fair to say that your statement that the merger of Von's and Shopping Bag tending to create a monopoly in the sale of groceries and related products is [fol. 1195] just pure speculation on your part and a surmise?

A. It is opinion, strictly opinion, yes.

Q. Do you distinguish between opinion and speculation, Mr. Richey? Aren't they the same thing in your mind?

A. As far as the word "monopoly," the speculation on it, I believe if they continue to merge and grow that there will be a lessening of the competition and more of a trend to control by the larger units.

Mr. Bates: I have no further questions.

Mr. Hughes: For the record, Mr. Bates, in his amendment he did not use the word "monopoly."

Mr. Bates: Mr. Hughes, I have before me a supplement which you handed me last night purporting to amend the statement that previously have been given us and it says at the bottom: "P. 16—strike 'and tending to—area.' in the last sentence and insert 'among the chains and aggravate the status of the independent market operators." Is that the only correction that was made?

Mr. Bates: Q. By striking those words, then, you don't intend to claim that this merger is tending to create a monopoly; isn't that correct?

A. I believe that the intention is to decrease the amount of units and companies and more control for fewer concerns.

Mr. Bates: That is all.

[fol. 1196] By Mr. Alsup:

Q. Do you have any idea, Mr. Richey, how many grocery concerns do business in Los Angeles and Orange Counties?

A. Are you talking about units of markets or number of operators?

Q. I am talking about separate grocery concerns.

A. I would say around six to eight thousand.

Q. And some of those are what you consider large chains and a great number of them you would consider small chains?

A. Correct.

Q. And even a greater number of two and three store operators?

A. Quite a few two and three store operators.

Q. And several thousand single store operators; isn't that right?

A. Correct.

Q. When a single store operator acquires a second store that results in a lessening of the single store operators; isn't that right?

A. That is correct.

Q. And that has happened quite a bit in your experience in this industry, hasn't it?

A. Yes.

Q. This John Codd that you referred to, did you know him?

[fol. 1197] A. I know him personally.

Q. Did you know that he was the manager of an Alpha Beta Store before he opened this store on his own at 160 East College Street in Covina?

A. Yes.

Q. That was an Alpha Beta Store, as a matter of fact, wasn't it?

A. That they closed.

Q. Yes. And he was a former employee of Alpha Beta and he took over the store; isn't that right?

A. That's correct.

Q. And a little later he bought a Fox Market at 1052 North Citrus Avenue in Covina, didn't he?

A. That's correct.

Q. And then Mr. Codd got into some financial difficulty because of some other investments outside the grocery business and went into bankruptcy, did he not?

A. He went into bankruptcy. I don't know why exactly.

Q. In this same period that you have been observing the grocery business haven't you observed that the chains really furnish the training and experience for the men who even-

tually leave them and open their own stores to furnish competition to the chains?

A. Partially, yes.

Q. That was true in the case of Mr. Codd, wasn't it?

[fol. 1198] A. That's true.

Q. Do you know Joe Hughes of Hughes Market?

A. Not personally.

Q. You know he used to work for Thriftimart and started his first store in 1952, don't you?

A. I couldn't say for sure that that was the date.

Q. Would it be around that period, according to your understanding?

A. Approximately.

Q. He has been successful, hasn't he?

A. Very much so.

Q. He has built himself a fairly substantial chain of about 14 stores; isn't that correct?

A. Correct.

Q. Are you acquainted with Ted Wood?

A. Yes.

Q. And he was an employee of Alpha Beta for many years, wasn't he?

A. That's correct.

Q. And he left Alpha Beta in 1954 and opened up his first store in the Pasadena area, did he not?

A. That's right.

Q. He has been successful, hasn't he?

A. Yes.

Q. How many stores does he now have in his chain?

[fol. 1199] A. He has, I believe, 11 or 12.

Q. Are you acquainted with Joe Goodnight who left Alpha Beta in '59 or '60.

A. No, I don't know him.

Q. You don't know he had worked for Alpha Beta for about 20 years?

A. I didn't know that.

Q. Are you acquainted with his Michael's Markets?

A. No.

Q. In your study of the grocery business in this area haven't you read about Michael's Markets?

A. I have read about Michael's but I don't know him personally.

Q. You know it is a successful small chain at the present time, don't you?

A. Correct.

Q. And you have seen others enter the business in this period and prosper and succeed, haven't you?

A. Yes.

Q. You mentioned Food Giant merged with McDaniel's. You read the trade papers pretty carefully, did you not?

A. Yes.

Q. And you knew that McDaniel's had expanded very rapidly in the past ten years and got up to a 24 store chain; isn't that correct?

[fol. 1200] A. That had quite a few units.

Q. The trade papers reported that the McDaniel's Stores had expanded much too rapidly on inadequate capitalization and got into financial trouble, didn't they?

A. Right.

Q. Before he went into bankruptcy the head of McDaniel's sold off a number of the stores in this chain to various smaller chains and independents, did he not?

A. Yes.

Q. Some in your area?

A. There are two in the area.

Q. Who bought those?

A. Tony Lombardo bought one, I don't know the name of the fellow that bought the other one. He went bankrupt.

Q. And there is another one out there just off the San Bernardino Freeway that still has a for lease sign on it?

A. That's correct.

Q. And Food Giant acquired out of bankruptcy the remaining 19 stores in the McDaniel's chain; isn't that right?

A. That's right.

Q. Did you read in the paper that the head of Food Giant said these weren't very good stores but there was a shortage of good executives in the grocery business and that is the reason he took the stores so he could get the executives?

[fol. 1201] A. I didn't see that article.

Q. You said that Alpha Beta merged with American. American has now changed its name to Acme, hasn't it?

A. I believe so.

Q. And that is the fourth largest chain in the United States; isn't that correct?

A. I believe so.

Q. And American had not done business in this area prior to its acquisition of Alpha Beta; isn't that correct?

A. That is correct.

Q. And this occurred after the merger of Von's and Shopping Bag; isn't that correct?

A. That's right.

Q. You haven't heard of the Government challenging that acquisition of Alpha Beta by American, have you?

A. No, I haven't.

Q. I think you might have mentioned Fox made some acquisitions. Do you recall that?

A. Yes, I remember that.

Q. They acquired Iowa Pork Shops, did they not?

A. That's right.

Q. And a number of other stores from Ralphs and various other concerns; isn't that right?

A. That's correct.

Q. And that is another case of a company which got [fol. 1202] started about 1954 and expanded into a large chain very rapidly and they were undercapitalized and got into financial trouble; isn't that right?

A. That's correct.

Q. That is based on your understanding from your study of the industry; isn't that correct?

A. That's correct.

Q. How about Yor-Way, didn't the same thing happen to them? Didn't they get started in the early 1950's and expand rapidly by getting a lot of old stores and get into financial troubles because of over-expansion on undercapitalization and go into bankruptcy?

A. That's right.

Q. And their stores were sold off to a number of single store operators and small chains; isn't that right?

A. That's right.

Q. In your study of the industry, Mr. Richey, you observed quite a few changes in the marketing conditions in this area, have you not?

A. That's correct.

Q. In this period since 1960 we have seen an influx of discount houses selling groceries; isn't that true?

A. That's correct.

Q. Have they come into your area?

A. Four units.

[fol. 1203] Q. They are pretty well going all around Los Angeles and Orange Counties, are they not?

A. That's right.

Q. And this creates a new form of competition that the grocers must face; isn't that correct?

A. That's correct.

Q. These discount houses draw from a much wider radius than the ordinary supermarket; isn't that so?

A. That's correct.

Q. And in this same period of time since 1960 you have seen an influx of bantam stores coming into the area, have you not?

A. Not into our immediate area.

Q. But you are familiar with what is happening in Los Angeles County.

A. In the metropolitan area, yes.

Q. There have been a large number of these bantam stores like Pronto and Speedee Mart and Tiny Tim and so on; isn't that correct?

A. Yes.

Q. And that is a new form of competition in the grocery business and it has occurred since 1960; isn't that so?

A. That's correct.

Q. In your time that you have been working in the industry, Mr. Richey, have you noticed that the liquor stores are getting a little bit larger and getting not only a larger [fol. 1204] share of the liquor market but also selling groceries, bread, milk and delicatessen items?

A. Convenience items.

Q. And convenience items. This is a relatively new form of competition, is it not?

A. Yes.

Q. Have you seen in this same period that the drugstores are selling more and more items that the grocery stores used to sell and the grocery stores are selling more and more of the items that the drugstores used to sell?

A. That's correct.

Q. This is a new form of competition that has been entering the area; isn't it?

A. It is not new. It has been going on for quite a while.

Q. It is becoming more and more so, isn't it?

A. Yes. I would say it is becoming more so.

Q. In your study of the trade papers and so forth have you read about what is happening in the East with the large gasoline service station chains putting in grocery departments in their gasoline stations?

A. I had heard about it, yes.

Q. You have read that more and more are trying in the East, have you not?

A. I understood that it was being tried, yes.

[fol. 1205] Q. And if it proves successful you would expect that to expand out into this area, would you not?

A. Probably.

Q. As a matter of fact, you have seen more and more of the gasoline stations in this area putting in their Coke racks and cigarette machines and even some of them starting to sell bread and milk; isn't that right?

A. Bread and milk in the gas stations I haven't seen yet.

Q. But you have seen more and more of the other I have talked about?

A. Beverage, sugar, items like that, yes. Draw items.

Q. You have seen many people enter the market and be successful and expand and grow and you have seen others both large and small, fail, have you not?

A. That's correct.

Q. You have read about King Cole, which was a five-store chain, and it decided to break up into five separate store operations and executives each took a store; isn't that right?

A. I heard something about that. King Cole? No, I didn't hear anything about King Cole. I am sorry, I didn't, not King Cole.

Q. And you read recently, did you not, that Al Goldstein, [fol. 1206] who used to be with Boy's Market has left Food Giant to become a single store operator?

A. Yes, I heard about that. I believe he took a store in Ventura.

Q. I think it was out in Glendale or Burbank.

A. Was it in the Valley? I understood it was in Ventura.

Mr. Alsup: I don't think I have any further questions.

(A short recess was taken.)

Cross-examination.

By Mr. Hughes:

Q. Mr. Richey, on your examination by Mr. Bates we went through the gross sales of Covina Farms Market from 1957 to 1962. 1961 was omitted, I believe inadvertently. Do you have the sales figures for 1961?

A. They would be approximately the same as '60.

Q. You said for '60 it was $1,250,000.

A. Approximately, yes.

Q. In your five-mile draw area, which you described upon examination by Mr. Bates, you named a number of stores with which you compete, and among these are Alpha Beta, Market Basket, Food Giant, Safeway, Lucky, Von's and Ralphs. Do you, in your opinion, believe you are competing solely with the store in your neighborhood or with the chain as a whole?

A. It is more with the store in the neighborhood.

[fol. 1207] But you realize it is a chain store that operates those facilities?

A. That is correct.

Mr. Alsup: Wait a minute. That question is confusing and ambiguous. "A chain store" doesn't operate those facilities in his area. You have named seven separate chains. That is not "a chain." I move to strike the answer so my objection can be recorded.

Mr. Hughes: Q. In your testimony on questions asked you by Mr. Bates, you mentioned certain advantages which the chains had over you. Speaking of just Von's, one chain at a time, do you believe they have these advantages over you?

A. Yes.

Q. Is it your opinion that the local Von's Store within your five mile draw area has these advantages over you?

A. Yes.

Q. These advantages relate to chain-wide advantages?

A. That's correct.

Mr. Alsup: I object to the question on the ground that it is confusing and ambiguous.

Mr. Hughes: Q. Did you understand the question?

A. Yes.

Q. In response to questions from Mr. Alsup you indicated a rather wide knowledge of the grocery industry in the area. [fol. 1208] In these trade journals, which you stated you have read, are they concerned with the Los Angeles metropolitan area more than Covina?

A. Yes. They are not any specific area, it is general.

Q. And you read these journals rather fully?

A. I read them.

Q. Where did you read this Times survey audit that was referred to?

A. It was showed to me by a salesman who had it.

Q. Is that published in the Times or is it a separate paper which comes out?

A. Separate paper.

Q. How often does that audit come out?

A. I couldn't say.

Q. What period of time was covered by that Times survey audit that you referred to on examination by Mr. Bates?

A. That was a current one for the year 1962.

Q. It went through the year 1962?

A. It was just one year. It showed percentages of market share, the top 20 chains.

Q. When was that survey published?

A. I don't know the publication date.

Q. When was it shown to you by the salesman?

A. Approximately a month ago.

Q. Have you seen any other charts on such market share surveys recently?

[fol. 1209] A. No.

Q. Based upon your experience in the grocery industry, and particularly at Covina Farms Market, do you consider sales of certain grocery products at a gasoline station as serious competition?

A. No.

Q. Do you consider sales of grocery products at liquor stores as serious competition?

A. Serious competition? No.

Q. How long a period have liquor stores been selling these grocery items?

A. As long as I can remember.

Q. Is this a new innovation?

A. It is not new but it is becoming more expanded, putting more and more in.

Q. Do you consider bantam stores serious competition to Covina Farms Market?

A. Not Covina Farms Market.

Mr. Hughes: That is all.

Redirect examination.

By Mr. Alsup:

Q. Mr. Richey, in this area there are a number of tiny little markets doing maybe fifty to seventy-five thousand a year business that are referred to as mom and pops, aren't there?

[fol. 1210] A. No, sir, there are not a number. I believe there is only one.

Q. I am talking about the Los Angeles metropolitan area.

A. Oh, yes.

Q. You wouldn't consider them serious competition to an operation like yours either, would you?

A. No, sir.

Q. Does Covina Farms Market compete with the Von's Store at 3rd Street just above Vermont?

A. No.

Q. Or the Von's Store out in the Leimert Park area?

A. No.

Q. It competes with the Von's Store located in your draw area; isn't that right?

A. That's correct.

Q. You referred to certain advantages that the chains have over Covina Farms Market. Did Alpha Beta have that advantage prior to the merger of Von's and Shopping Bag?

A. Yes.

Q. Did Ralphs have that advantage prior to the merger of Von's and Shopping Bag?

A. Yes.

Q. Did Von's have that advantage prior to its merger with Shopping Bag?

[fol. 1211] A. Yes.

Q. Did Lucky have that advantage prior to the merger of Von's and Shopping Bag?

A. Yes.

Q. Did Safeway have that advantage prior to the merger of Von's and Shopping Bag?

A. Yes.

Q. And Food Giant?

A. Also.

Q. And Market Basket?

A. Correct.

Q. One other thing which I neglected to ask you about, Mr. Richey. Have you seen in very recent years the emergence of the so-called milk depots?

A. Yes.

Q. In your area?

A. Yes.

Q. The price at which you sell your milk is fixed by state law is it not?

A. That's correct.

Q. And these milk depots can sell at a lesser price?

A. If they do their own bottling.

Q. And are there any in your area?

A. There is one that does.

Q. It can sell its milk at a lesser price that you can?

[fol. 1212] A. That's correct.

Q. Have you noticed that these milk depots are not only selling milk but they are selling other items as well?

A. That's correct.

Q What are those other items?

A. Bread, ice cream, potato chips—convenience items.

Q. Weiners and some delicatessen?

A. Some deli items, some cereals. It is mostly convenience items.

Q. And this is a relatively new form of competition?

A. In a manner of speaking, yes.

Q. When did this milk depot open in your area?

A. There are several of them. It is two or three years.

Q. And bread and milk and ice cream and weiners, potato chips and deli items are important draw items for a grocery store, aren't they?

A. They are important items. They are not what you would call a draw item.

Q But they represent a substantial portion of the business done by any grocery store, don't they?

A They take a percentage

Q. And a lot of the grocers are crying about how they are being hurt by these milk depots, are they not?

[fols. 1213-1214] A. Some of them are, yes.

Mr. Alsup I have no further questions.

Recross-examination.

By Mr. Hughes:

Q. Is Covina Farms Market crying?

A. No.

Q. Do you consider these milk depots serious competition?

A. They are competition but not serious competition.

Mr. Hughes: That is all.

Mr. Richey and Mr. Levinson, if it is agreeable with counsel for the plaintiff and the defendants would you waive signing this deposition?

The Witness: Would I waive signing it?

Mr. Hughes: Forego signing it.

The Witness: Sure.

Mr. Hughes: If we agree it is correct.

It is agreeable with you?

Mr. Alsup: With the understanding that it will be filed as the testimony of Mr. Richey even though it is not signed.

Mr. Levinson: Yes.

The Witness: Yes.

[fol. 1215] TESTIMONY OF CHARLES I. RUBIN

If subpoenaed to testify, Charles I. Rubin would testify as follows:

1. He is the owner of Road's End Market, 1332 South Glendale Avenue, Glendale, Los Angeles County, California. He has owned and operated this grocery store for the past 29 years. He does not operate the meat or produce sections which are owned by another party. In 1959 his business grossed about $262,000.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of

all advertised grocery prices which his customers are apt to read. Therefore, Mr. Rubin closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. He subscribes to the Key Services and follows the prices of all of the major chains appearing in those booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other trade publications, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store Age" and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the [fol. 1216] witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that single store operators cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the area arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result fewer grocery stores are needed in the area to serve a comparable number [fol. 1217] of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has ob-

served that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at these warehouses, and operate large trucking facilities. As a result they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from the Spartan Cooperative (a subsidiary of Certified Cooperative) and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that Spartan does not carry such major products as dairy, meat and produce items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution systems. Thus they have combined the advantages of the cooperatives with direct purchasing and a highly developed distribution sys-[fol. 1218] tem. In addition, some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.5 per cent to 41.7 per cent; the market share of the 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

9. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that [fol. 1219] they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

10. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same lines and the stores are known as "Von's & Shopping Bag."

12. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of Von's that the competition which Von's faces has not been "cut throat" or "devastating" and that there are no "intense price wars." He would testify, however, that he faces very vigorous competition from Von's.

13. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field [fol. 1220] since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

14. He would state that if this merger of Von's and Shopping Bag is permitted there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the

large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1221] Deposition of CHARLES I. RUBIN, taken on behalf of the Defendants, at 433 South Spring Street, Los Angeles, California, at 9:30 A.M., Tuesday, April 23, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

CHARLES I. RUBIN, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Vaughn:

Q. Will you state your full name for the record, please?
A. Charles I. Rubin.
Q. Where do you live?
A. I live at 2220 Richland Avenue, L.A. 27.
Q. May I ask your age, sir?
A. I will be 53.
Q. Soon?
A. In May.
Q. Are you the owner of the Road's End Market at 1332 South Glendale Avenue, Glendale?
A. I am the owner of the grocery department.
Q. Grocery only?
[fol. 1222] A. Grocery and liquor only.
Q. Who owns the other departments?
A. Fred Reavis owns the meat and Sam Arzoumanian owns the produce and Chris Knudsen owns the bakery.
Q. When did you first start business at this location?
A. Well, I started originally with myself, my dad and my brother in 1933, November 1st.
Q. At this location?

A. At this location.

Q. I take it that your father and your brother have since left the business.

A. Well, they are both deceased since.

Q. How long since the last one died?

A. Well, he has been out—I took it over individually in 1950 when he became ill and he passed away this year, but he hadn't worked since he became ill.

Q. How large is your store, the store in which you have a grocery concession?

A. You mean the floor area?

Q. Yes.

A. Well, actually I never really measured it. I would say it's about, oh, possibly 40 or 50, approximately. That is just a surmise on my part. I never measured off the area.

Q. That would be about 2000 square feet, something like [fol. 1223] that?

A. I assume. Somewhere in that neighborhood.

Q. This includes all departments, not just yours?

A. No, that just includes my department.

Q. That is just yours?

A. Yes.

Q. How about the size of the store as a whole?

A. The market itself I would say is about in the neighborhood, I am assuming that it is about 100 feet long, but it is very shallow. Our end is about, where I have my department, about 40 feet deep and the butcher runs about the same depth but the vegetable department, the market only goes back, I'd say, 25 or 30 feet.

Q. Would you tell me the names of competing stores in the general vicinity of your store, that is the stores you feel are competing with you and how far away, approximately, they are from your store?

A. Well, we have Cracker Barrel, which is a block, we have—The stores that I feel are competing with me, we have Von's and Shopping Bag, which is, I would say, about a mile and a half; we have Ralphs, that is about a mile; we have Hughes, that is about a mile; and we have King Cole, which is about a half a mile.

Q. Is that all?

A. Well, I would actually say—You mean all the stores [fol. 1224] that are in our neighborhood?

Q. Yes. I would like to know all of them.

A. There is Silver's Market that is, I would say, about a mile and we have Beach's Market, which is approximately that distance.

By the way, we have two Ralphs, one is maybe a mile and one is two miles. Then we have Thriftimart, which is about two blocks above Von's. Then directly across the street from Thriftimart is a little independent called The Holiday. And then there is a market called Stop and Shop, which is a very small independent on Central. That is about a quarter of a mile away.

Q. Is that it?

A. I think, as I recall, that's them.

Q. Let us talk about the Cracker Barrel, a block away. Is that a large supermarket?

A. Yes, it is.

Q. Do you know how many stores Cracker Barrel operates?

A. Well, I know they operate two and it is my understanding that they are opening a third. Whether it is completed or not I am not sure.

Q. Is this Cracker Barrel in a shopping center?

A. Yes. They own the shopping center. It isn't a shopping center. He built the shopping center.

Q. When was that built, do you recall, approximately? [fol. 1225] A. I would say approximately seven years ago.

Q. The Von's, was that a Von's or a Shopping Bag Store?

A. That is a Von's. That is a new Von's.

Q. When was that built?

A. Possibly could be about three years now, two or three years.

Q. That is on what road or street?

A. The Von's?

Q. Yes.

A. That is on Glendale Avenue.

Q. There isn't an old Food Giant across the street from that store, is there?

A. No. There is no Food Giant across the street. There

was a Yor-Way a block away from him which closed. There also was a Thriftimart which closed too.

Q. How about the Ralphs that is a mile away, when was that opened, do you remember?

A. They closed the one closest to us. That was opened, as I recall, prior to our time. It is one of the old, old ones.

Q. Prior to 1933 was that?

A. I think so. As I recall, it was. I am pretty sure.

Q. How about the one two miles away?

A. That, I would say, has been open, I am not sure, but [fol. 1226] it has been open a long time. I would say it has been there a good 15 years or better.

Q. How about the Hughes Market a mile away, when was that opened?

A. The Hughes was opened approximately a couple of years ago.

Q. King Cole a half a mile away, when was that opened?

A. They didn't open. Originally it was an independent and King Cole took it over, and that is going way back, I would say possibly 20 years ago.

Q. King Cole took it over 20 years ago or the independent opened it 20 years ago?

A. The independent was there. Now, I don't recall actually when King Cole took it over.

Q. Do you know that the King Cole chain has disbanded now?

A. Yes, I do.

Q. Their stores have been sold and are now being operated by former executives and employees of the King Cole chain for the most part?

A. That is my understanding.

Q. Do you know who operates that King Cole Market now?

A. There is a fellow by the name of Pete, I believe it is Morris. Now, I am not positive but I think that is what [fol. 1227] it is.

Q. As to Silver's Market, I take it that a single store operator operates that store?

A. Yes, it is.

Q. How long has he been there?

A. Oh, approximately a year.

Q. Is that a new store?

A. It was formerly a Thriftimart.

Q. When did Thriftimart open at that location?

A. Well, I don't know when they opened it, but prior to them a man by the name of Dales used to own it and they took it over from him.

Q. Is that a small store?

A. Just an average size, just standard store. It is not a big store.

Q. Would you classify it as a supermarket?

A. No, I wouldn't.

Q. I take it from its original conception to now has been at least 20 years.

A. Just what do you mean?

Q. Was it first opened by Mr. Dales 20 years ago or more?

A. Yes.

Q. Beach's Market, is that one of the Beach chain stores? [fol. 1228] A. Yes, it is.

Q. That is a mile away?

A. Approximately.

Q. When was that opened, do you remember?

A. I don't recall when but it has been there quite some time.

Q. How many stores does Beach Grocery Company operate, do you know?

A. No, I am not sure.

Q. The Thriftimart a mile and a half away, when was that opened?

A. That I don't recall either.

Q. Is it new or relatively old?

A. Which Thriftimart were you referring to?

Q. Well, you said that apparently there is one Thriftimart within a mile and a half of you now.

A. Yes. That was opened at a time very close that Von's was.

Q. Which would be roughly three years ago?

A. I would say, or a couple of years ago.

Q. Holiday across the street from that Thriftimart I take it is a single store operator?

A. Yes, he is.

Q. How would you describe his store in terms of size?

A. He has a very small store.

[fol. 1229] Q. A mom and pop store, would you say?

A. From its size, yes. Possibly a little larger, but not much.

Q. When did that store open, do you know?

A. They have been there a good number of years.

Q. Now the Stop and Shop a quarter of a mile away from you, I take it that is also very small?

A. Yes, it is. That is a momma and poppa size.

Q. When did that open up?

A. That has been there quite some time. That changed hands but it has been there quite sometime.

Q. You have told me about a Yor-Way Store and a Thriftimart which closed near Von's Store. Have there been any other stores which have closed and have not been reopened by anybody in your trading area, let's say within two miles of your store in the last ten years, or since 1950, let's say?

A. I don't know whether they closed since or prior to, but we did have several that have closed. There was one Dave Marias had a market on Central that closed; there was one called the Tower Market, it closed; Fitzsimmons originally closed. They had that closed where Hughes is now.

Oh, yes, there is a market called Long's right across the street from Von's, it closed and never reopened. That's [fol. 1230] about all I can recall right now.

Q. 1950 was when you took over sole operation of the grocery department in your store; isn't that right?

A. Yes.

Q. Can you relate these closings to that time? Was it before or after?

A. I don't recall.

Q. Would you say then that it was close to 1950 when these stores closed?

A. Well, I know Long's closed after that. You know, it's funny I have a memory that doesn't retain things. I just don't recall.

Q. But the only one you are able to say that did close after 1950 is Long's, Yor-Way and the Thriftimart; is that right?

A. Now that I recall it I believe there was two Thriftimarts that closed. There was two Thriftimarts, that's

right, in the same area. I believe there were two Thriftimarts.

Q. But those are the only ones that you are able to positively state closed after 1950; isn't that right?

A. Yes.

Q. By those I mean——

A. As I recollect I think that's it.

Q. I take it that you have a copy of a document entitled [fol. 1231] "Testimony of Charles I. Rubin"?

A. Yes, I do.

Q. Would you refer to that for a moment with me?

A. Yes.

Q. Specifically refer to Paragraph 3 where it reads: "On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined." What area are you referring to there where this decline has taken place?

A. Well, Long's is one of them.

Q. What is the area you are referring to there; is that the Glendale area?

A. Yes. That is in the Glendale area. Well, I don't know about the whole Glendale area, I am only referring to the area that we have been discussing.

Q. Say within two miles of your store; is that right?

A. Yes.

Q. You did not mean to make reference by that sentence to any area outside of that two mile area; isn't that correct?

A. Yes, I would say so.

Q. I take it you do not know whether the number of single store operators outside of the two mile area surrounding [fol. 1232] your store has declined or increased since 1950, do you?

A. Well, I know of one of them that went out but I specifically don't know.

Q. You don't know whether more have gone out of business than have come into business outside of the imediate area where your store is; is that correct?

A. That's right.

Q. Mr. Rubin, have you ever made an attempt to get into a shopping center?

A. No, I personally have not.

Q. In the immediate vicinity of your store did you notice any change in competition after March 1960?

A. Would you repeat that question again?

Q. In the immediate vicinity of your store did you notice any change in competition after March 1960?

A. Well, I don't know exactly, but I would say in that vicinity, yes, I have.

Q. What changes have you observed since that time?

A. We have had Hughes go in, we have had Von's built, Thriftimart.

Q. Would you say that competition has increased in the vicinity of your store since March 1960?

A. I would say so.

Q. Have you noticed any changes since that time in grocery retailing generally, and let me refer you specifically [fol. 1233] to the sale of food through discount houses. Are there any discount houses in the immediate vicinity of your store?

A. No.

Q. You are aware, are you not, that there are discount houses, and many of them, in the Los Angeles metropolitan area that sell food?

A. That is my understanding.

Q. Is it also your understanding that this method of food distribution is something relatively new?

A. Yes.

Q. Are you also aware of the development and the increasing number of so-called bantam stores?

A. Yes.

Q. And that is a relatively new development in food retailing, is it not?

A. Yes.

Q. About how many grocery items do you carry in your grocery department in your store?

A. How many items?

Q. Yes.

A. You know, that is something I never gave a thought, individually how many items. I know we are limited to the items due to lack of space.

Q. You carry less than the supermarket would carry, [fol. 1234] do you not?

A. Yes.

Q. But probably more than the very small mom and pop store?

A. Yes.

Q. Wouldn't you say that the very small mom and pop store probably doesn't carry more than 400 grocery items?

A. I can't say.

Q. Are there any liquor stores in the area that you serve?

A. Yes.

Q. I take it there is a liquor concession in your particular store which you operate; is that right?

A. Yes.

Q. There are other just straight liquor stores?

A. Yes.

Q. Do any of them carry groceries?

A. No, they don't. Most of them carry bread and milk, items of that nature, that's all, the ones that I am familiar with in my vicinity.

Q. Do you know whether or not these stores sell more bread and milk than a small mom and pop store?

A. I don't know.

Q. Have you been aware of the fact that liquor stores in the Los Angeles metropolitan area generally have increased [fol. 1235] the sale of grocery products in their stores in recent years?

A. Would you repeat that again? I hope you forgive me.

Q. Maybe I can ask Mr. Leibovitz to read it back to you.

(The reporter read the pending question.)

The Witness: That is my understanding, that they have.

Mr. Vaughn: Q. Do you know whether these larger liquor stores that sell groceries sell more groceries than an average mom and pop store?

Mr. Coyle: I don't think he ever testified that he knows the large liquor stores sell groceries.

Mr. Vaughn: I misunderstood his testimony.

Mr. Coyle: He said bread and milk is all.

Mr. Vaughn: Q. Are you aware of the fact, sir, that certain larger liquor stores in the Los Angeles metropolitan area in recent years commenced to sell groceries, including bread and milk and other grocery products?

A. Yes.

Q. Do you know whether or not some of these large liquor stores sell more grocery products than an average mom and pop store?

A. I can't say.

Q. You have been in some of these liquor stores, haven't you?

[fol. 1236] A. I don't get around too much, no. I am pretty well tied down with my own work.

Q. So you have not been in one of these liquor stores that carries a fairly wide array of grocery products; is that right?

A. Oh, actually I went in to see Sales out in the Valley once, when they built those type of stores. But other than that I don't get around much.

Q. You have ben in mom and pop stores of average size, have you not?

A. Yes, small ones.

Q. Did it appear to you, based upon your experience, that this large liquor store that you saw built by Dales would sell more grocery products than a small mom and pop, or an average mom and pop?

A. Yes, it did.

Q. It did appear in that one?

A. That particular one it did, yes.

Q. Are you a member of any cooperative?

A. Yes; Spartan.

Q. I take it that aside from liquor that Spartan provides you with almost all of the products which you ultimately sell; isn't that right?

A. The dry grocery items and deli.

Q. Do you know whether or not you can purchase through [fol. 1237] Spartan your dry groceries and deli products as cheaply as the chains can purchase similar items directly from suppliers?

A. Well, I assume if they bought it direct from the manufacturer they could probably buy it. That is only my assumption.

Q. Buy it cheaper?

A. I would assume that.

Q. Spartan is a subsidiary of Certified Grocers, is it not?

A. That's right.

Q. And Certified Grocers buys in very heavy volume, does it not?

A. Yes, they do.

Q. For itself and for Spartan; correct?

A. Yes.

Q. Wouldn't you imagine that the purchases of Spartan and Certified exceed the purchases of any chain in the Los Angeles metropolitan area?

Mr. Knight: Before you answer that question, Mr. Rubin, I would like to object to it on the ground that we don't want to call for the imagination of the witness. We want his facts and we want his opinion based upon his experience in the grocery industry.

Mr. Vaughn: I will rephrase the question.

Q. Do you know whether or not Certified and Spartan [fol. 1238] buy in greater quantities than any chain operating in the Los Angeles metropolitan area?

Mr. Knight: Before you answer that I am going to object because he has testified that he is not a member of Certified but he is a member of Spartan. Therefore the question should be limited to his knowledge of Spartan.

Mr. Vaughn: I cannot understand the fact that he is a member of Spartan limits my question to Spartan.

Q. I am asking about your knowledge of Certified and Spartan.

A. I have no knowledge of Certified. I don't deal with Certified.

Q. You don't know whether Certified buys in greater volume than any chain; is that correct?

A. That's right.

Q. Despite your continued study of the grocery business in the Los Angeles metropolitan area?

A. That's right.

Q. I take it, then, if you do not know the volume in which Certified purchases you cannot state whether members of Certified are able to purchase their groceries any cheaper than chains who operate their own warehouses; isn't that correct?

Mr. Knight: Before you answer that, Mr. Rubin, I will renew my objection concerning any questions directed

[fol. 1239] toward Certified since the witness is not a member of Certified.

Mr. Vaughn: Q. You may answer.

A. What was your question?

Mr. Vaughn: I will ask Mr. Leibovitz to read it.

(The reporter read the pending question.)

The Witness: Yes, that's correct.

Mr. Vaughn: Q. You don't know whether a member of Certified does or does not have an advantage over a chain in terms of purchasing and distribution?

A. No, I don't.

Mr. Knight: Have I cut your answer short or do you want to go on?

The Witness: No.

Mr. Knight: So that I understand what is going on here, when you answer, "No, I do not," are you answering that you do not know about Certified's operations or Certified's customers or their purchases and so on?

The Witness: That's right, I have no knowledge of their operation at all.

Mr. Knight: Thank you.

Mr. Vaughn: Q. I take it you do not know whether membership in Certified provides those stores which are members of Certified with advantages over chains?

Mr. Knight: Before you answer, again I renew the objection to any and all questions concerning Certified since [fol. 1240] the witness has testified that he is not a member of Certified.

Mr. Vaughn: Q. Isn't that so?

A. Right.

Q. In the last five years, Mr. Rubin, what has happened to the volume of sales in your grocery department and liquor department in your store? Has it gone up or down?

A. Well, it hasn't increased.

Q. It stayed about the same?

A. It stayed about the same. It has dropped.

Q. But only slightly, I take it?

A. It varies. It will drop, it will move up, depending upon your transient business.

Q. What transient business do you have, people that walk by the store?

A. People that drive.

Q. Do you have parking facilities at your store?

A. Yes, I do.

Q. That is right out in front, isn't it?

A. Yes, right out in front.

Q. If you can tell me, what were your gross sales in 1962?

A. I am assuming now they are in the neighborhood of around $225,000 or thereabouts.

Q. You are assuming, you don't know? Is that because [fol. 1241] you don't have your books right with you?

A. That's right.

Q. What were they in 1961?

A. I also would have to look up in my records. I don't recall.

Q. But in any event you are able to tell us that there have been increases and declines in your sales, but generally speaking they have been pretty much the same over the last five years?

A. I can't go back and say the last five years. I am just trying to recall the last two years. I don't know without checking my records. My bookkeeper handles that and I don't know.

Q. So you are not able to tell me whether or not your sales are lower now than they were in 19——

A. No, I can't tell you that accurately.

Q. —1958?

A. I couldn't recall.

Q. Couldn't you tell me generally speaking that you have——

A. That is my problem. I don't retain that type of information. At the time I read it I remember it and after that I have so many other things I take care of that I just don't recall those things. I will have to look it up myself to see what I did the holiday prior to the one I did [fol. 1242] this year. I just don't recall.

Q. Has your business been operated successfully or profitably over the last five years?

A. Yes, it has.

Q. Indeed it has been operated profitably since 1933, has it not?

A. Well, we have been able to survive.

Q. I take it that in the years that you have been in the business you have seen a number of smaller concerns expand and grow, have you not?

A. You are referring to my vicinity, in my area?

Q. Yes. Let's talk about your vicinity.

A. No.

Q. Cracker Barrel is a relatively new concern, is it not?

A. They are a new concern but they are not a concern that has grown since they have been there.

Q. Is this their second store?

A. No. This is their first.

Q. And then they built another one some place else, did they not?

A. That's right.

Q. And they are building a third in another location now; isn't that so?

A. That is my understanding that they are going to.

[fol. 1243] Q. And they built this first store about seven years ago, you said?

A. Approximately.

Q. So in the last seven years here is a concern which has apparently succeeded and expanded in the business; is that not right?

A. Yes.

Q. Another example from your own area is Hughes Markets; isn't that so?

A. We have a Hughes Market.

Q. Didn't Hughes enter the grocery business in the Los Angeles metropolitan area for the first time in about 1954, or do you know?

A. I don't recall the date they entered.

Q. Was it after 1950?

A. I still don't recall.

Q. But there is a concern that has grown from one store into operating several stores in the Los Angeles metropolitan area; isn't that correct?

A. Well, it was always my assumption that they took over some of the Fitzsimmons Stores, or some chain. I can't recall which one.

Q. You had assumed that they entered the business for the first time by taking over a Thriftimart or a Fitzsimmons Store?

[fol. 1244] A. It was my understanding.

Q. Do you know Joe Hughes at all?

A. No, I don't.

Q. Do you know what he was doing prior to the time that he started operating his own business?

A. It was told to me one time. I think he was affiliated with some company.

Q. He was working for Thriftimart, wasn't he?

A. I wouldn't swear to that because I don't know.

Q. There are rather new concerns. For example the Silver's Market, they went in there about a year ago; isn't that right?

A. I would say approximately.

Q. Do they appear to be succeeding in their location?

A. They appear to be. It was a going Thriftimart Store that took over when Thriftimart gave it up.

Q. Do you know why Thriftimart gave it up?

A. Because they opened their new shopping center on Glendale Avenue.

A. Yes, that is right next—within a block of Von's.

Q. And near Silver's?

A. No, they are not near Silver's.

Q. Wouldn't you say it was probable that Thriftimart was not making a profit at that store?

[fol. 1245] A. I couldn't say.

Q. You don't know. Do you know whether Mr. Silver, if that is who operates Silver's Market, had any prior experience in the grocery business before taking over this store?

A. It is my understanding that he did.

Q. Do you know what that experience was?

A. No, I don't.

Q. Would you refer to Paragraph 13 of your statement, sir. Would you state what acquisitions and consolidations since 1948 you had in mind in making that statement?

A. Well, I believe Acme took over Alpha Beta.

Q. Do you know whether that was before or after the Von's-Shopping Bag merger?

A. No, I don't.

Q. What others?

A. McDaniels, part of them were taken over, I believe, by Food Giant. Offhand I just can't recall. I knew them but I just don't recall them now.

Q. But you have told us everything that you had in mind when you signed that statement, is that right, concerning specific acquisitions and consolidations?

A. No. There are a few others that I had in mind but I just don't recall them at the moment.

Q. You don't recall what they are? Why don't we take [fol. 1246] a break and let you think about it.

(A short recess was taken.)

Mr. Vaughn: Q. Do you remember any other mergers or consolidations now?

A. Yes. McDaniels I recall were taken over partly by Food Giant and partly by Hughes. I believe Fox was taken over, even though they went out, by Food Fair I believe it is. And Alpha Beta, as I recall, I believe they took over the Raisin chain.

Q. You didn't talk to anybody about this question during the time we had a recess, did you?

A. No, I didn't.

Q. Is that all you remember at the moment?

A. That's all I recall.

Q. McDaniels was a chain of roughly 24 markets four years ago, was it not?

A. I don't know the specific amount.

Q. Do you know that they did get in financial difficulty?

A. That was my understanding.

Q. And that they sold off many of their stores to single store operators?

A. I believe they did.

Q. And they sold off about three to Hughes; isn't that right?

[fol. 1247] A. I don't know the specific amount.

Q. And then they sold off the remaining stores, which were about nine in number, to Food Giant; isn't that right?

A. I still don't know the exact amount.

Q. And they went into bankruptcy; isn't that so?

A. I don't recall exactly what happened towards the end.

Q. You don't know whether they went into bankruptcy or not?

A. No, I don't.

Q. Or whether they made an assignment for the benefit of creditors; is that right?

A. No, I don't.

Q. But you do know they were in financial difficulty?

A. That is my understanding that they were.

Q. Now the Fox chain. That was a chain that was started by Eddie Fox in the mid 1950's, wasn't it?

A. I don't know the exact time.

Q. They expanded very rapidly; is that not so?

A. I believe they did.

Q. And they found themselves in financial difficulty; isn't that correct?

A. Yes.

Q. And they did go into bankruptcy, did they not?

A. That is the way I understood it to be, yes.

[fol. 1248] Q. And isn't it so that their financial difficulty is attributed to over-expansion with inadequate capital?

A. Well, we assume that.

Q. Many of the Fox Stores were sold off to single store operators, were they not, and smaller concerns?

A. I couldn't say.

Q. You don't know?

A. I don't know.

Q. But the remaining five stores are now being operated by Food Fair; isn't that right?

A. I don't even know if the remaining, all of them, are. No, I can't answer that.

Q. Some Fox Stores are being operated by Food Fair; isn't that right?

A. I don't even know that.

Q. So you don't know if there was any consolidation or acquisition, or anything of that kind, do you?

A. No, I don't.

Q. How many stores did Raisin have when it sold to Alpha Beta?

A. I don't know.

Q. When did that take place?

A. I don't know.

What chain operates the greatest number of stores in the Los Angeles metropolitan area, Mr. Rubin?

[fol. 1249] A. I am not sure but I think Von's is one of them.

Q. One of them?

A. I don't know if they are one of them or they are the one.

Q. You don't know who has the greatest number of stores?

A. No, I really don't.

Q. You do know, do you not, that Safeway is a national chain?

A. Yes.

Q. And reputed to be the second largest national chain of grocery stores; is that not so?

A. Which one is the first?

Q. Isn't A & P the first?

A. I can't even answer that.

Q. You don't know. A & P also is a large national chain?

A. Yes, they are.

Q. And they operate stores in this area, do they not?

A. Yes, they do.

Q. Acme, which, as you have pointed out, acquired Alpha Beta and is also a large national chain, is it not?

A. I don't even know that.

Q. You don't know that they are the fourth largest chain in the nation?

[fol. 1250] A. I didn't know that.

Q. Food Fair is a large national chain, is it not?

A. I can't answer that. I don't know.

Q. Do you know whether or not they were operating any stores in Los Angeles or Orange Counties prior to the time that they began operating the Fox Stores?

A. No, I don't.

Q. Do you know whether Acme had any stores prior to its acquisition of Alpha Beta?

A. No, I don't.

Q. You state in Paragraph 14 of your statement that there will probably be subsequent mergers between and involving the other major chains.

A. I feel that in time there will.

Q. What chains do you think will merge?

A. I don't know.

Q. You have no way of predicting what particular chains will merge.

A. Yes.

Q. You just have a feeling that chains will merge.

A. That's right.

Q. Would it be fair to say that your conclusion in that respect is speculation on your part?

A. No, I don't believe it is. I believe that they will. That is my personal belief.

[fol. 1251] Q. Your personal belief that they will merge?

A. Yes.

Q. But you are unable to tell me what chains will merge?

A. That's right.

Q. Why do you believe there are going to be mergers in the future?

Mr. Knight: Before you answer that, it is calling for the operation of the witness's mind and I object to it on that ground. He has stated that it is his belief and I think it should be dropped there.

Mr. Vaughn: Q. On what do you base your belief?

A. Well, from the past history of the operation of chains such as Von's and Shopping Bag, which is one. I feel if they have done it others will follow.

Q. Why?

A. That is my belief.

Q. But you can't tell me why?

Mr. Knight: I will object to that on the ground that the question is argumentative.

Mr. Vaughn: Q. You can still answer the question. You cannot tell me why that is your belief; is that a fair summary of your testimony?

A. Well, as I say, from the history of Von's and Shopping Bag, that chain merged there and it is my belief that [fol. 1252] others will follow suit if they are allowed to continue.

Q. Now I would like to know the basis for your belief.

A. Well, other chains have merged, as we have noticed, and some that we have mentioned. I just feel that trend will continue. From my observation of what has happened here that's all I can say.

Q. That is the most you can say about that subject; is that right?

A. Yes.

Q. Would you say that there is vigorous competition in the grocery business in Los Angeles and Orange Counties today?

A. I feel there is competition today, yes.

Q. And vigorous competition; isn't that right?

A. I would say so.

Q. Is it any less vigorous today than it was three years ago?

A. I can't say.

Q. Would you think it was more vigorous?

A. I can't say.

Q. In your particular community it is more vigorous, isn't it?

A. Well, we have had more markets in our community.

Q. Is it your conclusion then that competition is more [fol. 1253] vigorous today?

A. Yes.

Mr. Vaughn: I have nothing further.

Mr. Knight: Mr. Reporter, I would like to offer the statement entitled "Testimony of Charles I. Rubin" as Rubin Exhibit No. 1 for identification.

(The document referred to was marked by the notary public as Rubin Exhibit No. 1 for identification, a carbon copy of which is attached in lieu of the original.)

Cross-examination.

By Mr. Knight:

Q. Would you care for a little rest?

A. No, that's all right.

Q. I have just a few questions and maybe counsel will have a few more, but it won't be too long.

Mr. Rubin, would you please tell us what your total experience in the retail grocery business in the Los Angeles area has been, that is since you were a boy and a man, and including everything that you have done, whether it be a box boy or a clerk or salesman? Would you total up the years that you have in the industry?

A. My total years go back in the original days when I was out of school. My folks had a grocery store and I always worked, practically—in fact I can say all my life [fol. 1254] actually, my working days. I only worked on one other job, and that was a very, very short time. The rest of the time was in the food industry.

Q. Would you say that roughly that would amount to a total of perhaps 40 or 50 years?

A. Well, take my age less about—I worked when I was going to school and after school, so I actually was about 16 when I started.

Q. That would be about——

A. I would say about 36 years—35 or 37 years.

Q. So that when you were questioned concerning your beliefs as to what is happening in the grocery industry your answers are based upon a total of 37 years of experience and observation; is that correct?

A. That's right.

Q. Counsel asked you a question concerning the Dales Store, Mr. Rubin. Do you recall the reference to Dales?

A. In our neighborhood?

Q. Yes, sir.

A. Yes.

Q. Would you consider——

A. Pardon me.

Q. In your neighborhood, or wherever it happens to be, sir.

A. The one that we referred to, that particular store [fol. 1255] that they opened up that is a liquor and grocery?

Q. Yes. The one you had in mind when you responded to counsel's question.

A. Yes.

Mr. Vaughn: There are two Dales.

Mr. Knight: Q. Would you identify the location of the Dales that you were referring to?

A. The one we were referring to was the one that they opened up, Dales Junior specifically is what it is called. They have big Dales supermarkets and then they have this Dales Junior that they started.

Q. They have two types?

A. Yes, they have two types. They have the regular supermarket and then they have these Dales Juniors they started out in the Valley, which consist of a small grocery and liquor store. They call it a fast store.

Q. These Dales Juniors, have you been in one of them?

A. Yes, I have been in one of them.

Q. Very recently?

A. No. It has been quite a while. In fact when they first opened it up he invited me out to see it and that has been quite a few years back.

Q. Did you notice whether they handle a full line of dry groceries?

A. Well, they have a representation of a full line, you [fol. 1256] know. In other words, in smaller quantities.

Q. Now referring to the larger Dale operation, would you, based upon your experience in the industry, consider the larger Dales Stores more of a grocery store or liquor store?

A. No, they are a supermarket. They are a big market.

Q. They are a full line?

A. Full line of everything.

Q. They have meats?

A. Everything.

Q. Produce?

A. Liquor and everything.

Q. And dry groceries?

A. Yes.

Q. Counsel queried you concerning your total sales over the past few years, Mr. Rubin. You gave us your gross in 1962 as being approximately $225,000. Would you say that thus far in the calendar year 1963 your sales are approximating those of the first three months of 1962?

A. I would say they are.

Q. This is in the grocery and liquor only?

A. That's right.

Q. You lease out the meat department, do you, sir?

A. Yes. I have the master lease on the building and I sublease the other departments.

[fol. 1257] Q. You sublease the produce and the meat?

A. Produce, meats and bakery.

Q. You told us, Mr. Rubin, that you are a member of Spartan Grocers; is that true?

A. Yes.

Q. For how many years have you been a member of Spartan?

A. Well, it has been over 30. It was 29. We were a member prior to that time. I would say we are a member of Spartan 32, 33 or 34 years.

Q. Do you recall approximately how long ago it was that Spartan no longer could be considered an individual entity?

A. Is that when Certified——

Q. Yes.

A. I don't recall the exact time.

Q. Would it be three or four years ago?

A. It appears to me it is longer. I could be wrong.

Q. Were you ever a member of the Orange Empire co-op, sir?

A. No.

Q. Do you know approximately in what area of Los Angeles the Orange Empire operations are conducted?

A. No.

Q. Do you know whether Orange Empire services the [fol. 1258] entire San Fernando Valley?

A. I can't say. I don't know.

Q. About a year or two ago, Mr. Rubin, was there any change of any kind in your relationship with Spartan?

A. No, sir, I don't believe so.

Q. Were you required to increase your membership, sir?

A. You see, I was never—We usually leave our dividends accumulate and that takes care—Pardon me. Maybe I don't quite understand the question properly. Would you repeat that question?

Q. Was there any change in the membership fee that you were assessed?

A. Yes.

Q. Would you tell us about that change, please?

A. Well, originally we were paying dues and then they raised that and now they have raised it to a point now where we have to pay a processing charge for each order.

Q. Was there any change in the minimum order requirements, Mr. Rubin, over the past two or three years?

A. It is my understanding that there was.

Q. How much is this delivery fee, Mr. Rubin, if you know?

A. The which?

Q. The delivery charge. Shall we call it that?

A. $3.50.

[fol. 1259] Q. Prior to Spartan joining Certified did that $3.50 charge exist?

A. No, it did not.

Q. Do you run the so-called weekend specials at any time in your store?

A. No, we don't any more.

Q. Did you at one time run specials?

A. Years back.

Q. Would you care to tell us why you don't run specials any more?

A. Because we couldn't meet the competitive price of the bigger stores. It just had no effect whatsoever.

Q. Are you familiar, Mr. Rubin, with the Smart & Final Company?

A. Yes, I am familiar with them, though I haven't done much business with them. But I know of them.

Q. Do you know who owns them?

A. Yes, I do. I am trying to recall now. Smart & Final took over Haas Baruch. Isn't that funny, I can't recollect though I did know it.

Q. Mr. Rubin, based upon your experience of some 37 years in the industry, and based upon your observation of the discount house operations, would you say that all of these discount houses carry a full line of groceries, produce and meats?

[fol. 1260] A. I can't say that they do. Actually I have only gone into one of them myself.

Q. Which one was that, sir?

A. I believe it was Moore's out on the west end of town.

Q. Do they carry produce, sir?

A. No.

Q. Did they carry fresh meats, sir?

A. No. All they carried was groceries.

Q. Dry groceries, sir?

A. Yes.

Q. I believe that counsel queried you concerning the so-called shopping centers, Mr. Rubin. He asked you whether you had made an effort or an attempt to enter a shopping center, speaking of a new one, a proposed one, and your

answer was "No." Would you care to elaborate on that answer for us?

A. Well, in the first place I don't think I stand much of a chance. My financial rating wouldn't qualify, and also I wouldn't be any drawing card to a shopping center as a tenant.

Q. Based upon your 37 years of experience in the industry who would you say would be a drawing card?

A. Any of your major chains with a Triple A financial rating.

[fol. 1261] Q. Mr. Rubin, you are located on a very well traveled street, aren't you, that is your store is?

A. Yes, I am.

Q. Would you say that you enjoy a certain, well, for want of a better word, a certain transient trade?

A. I would say we do.

Q. And this would involve people who don't reside within a mile or two of your store?

A. That's right. The greatest portion of them don't.

Q. I was just going to ask that. I think the best way to do it would be this: Would you care to approximate for us the amount in terms of percentages, relating it to a hundred per cent of your business, which is made up of this transient business?

A. Well, I would say that 75 per cent of it is made up of transient. Of course, we have quite a few transient customers that are steady, that live, or work I should say, in an area where they go by our store and they live as far as La Crescenta or Montrose, and they find it very convenient to shop there. They want to get in and out fast. And those people are interested more in the personalized service we are able to give them.

Q. About how far away is La Crescenta and Montrose?

A. La Crescenta is about eight miles.

Q. How far away is Montrose, sir, from your store?

[fol. 1262] A. Well, Montrose and La Crescenta are within a radius of a very short distance, I think it's a mile or two.

Q. And your store is en route for people going home?

A. Yes. And people going to Pasadena, people living in Pasadena. We have them from all over.

Q. Approximately how far is Pasadena from your store?

A. Pasadena is about eight miles also.

Q. Mr. Rubin, you mentioned, and I jotted down the name here, I believe it is Dave Marias who had a store in your neighborhood. Did you know him, sir?

A. Yes, I knew Dave Marias.

Q. He once operated a grocery store near you?

A. Yes. In our early years when we first went in.

Q. And that store is closed now?

A. Yes. It has been for quite some time.

Q. Turner's Market, was that fairly near your store?

Mr. Vaughn: Tower.

Mr. Knight: I beg your pardon.

Q. Was that close to your market?

A. No. That was on Central up above, I would say, a good mile.

Q. And that store is closed now?

A. That store closed. It closed when Better Foods opened up.

Q. And the same question for Long's? Did a man [fol. 1263] by the name of Long once operate a grocery store near you?

A. Yes. He closed when Von's and Thriftimart opened.

Q. Counsel asked you concerning the now disbanded King Cole operation, Mr. Rubin. Do you recall that?

A. Yes.

Q. Do you know whether the King Cole Stores, or more particularly the King Cole Store near you was serviced by a truck or trucks operated by King Cole?

A. Their dry groceries? No. I believe they belonged to a co-op.

Q. Mr. Rubin, based upon your 37 years of experience in the retail grocery industry in the Los Angeles metropolitan area would you state that it has been your observation that the retail grocery industry in this area is becoming concentrated in fewer and fewer hands?

A. Are you speaking in our area or metropolitan area?

Q. Whatever area you are familiar with, sir.

A. I believe it is.

Mr. Knight: I have no further questions.

Redirect examination.

By Mr. Vaughn:

Q. What area were you referring to just then?

A. Well, actually from what I have observed and so forth I believe they are being affected in all areas.

[fol. 1264] Q. You feel that the grocery business is being concentrated in fewer and fewer hands?

A. Yes, I do.

Q. That means that there are less grocery concerns in the Los Angeles metropolitan area today than there were, what, three years ago?

A. Are you speaking about less independents or less chains?

Q. I am talking about less grocery concerns, whether they be chains or independents.

A. I can't.

Q. Because you told me it is being concentrated in fewer and fewer hands.

A. I figured fewer chain hands. Because no one of the independents, which naturally I am interested in, have gone out. I don't know what the percentagewise on the chain stores is. I couldn't say.

Q. In other words, you were talking only that there are fewer and fewer chains; is that it?

A. No. I would say there are fewer and fewer independents.

Q. Mr. Rubin, you told me earlier in your examination that you did not know if there were fewer single store operators in the Los Angeles metropolitan area now than in 1950; isn't that so?

[fol. 1265] A. I don't remember whether I did or not.

Q. It is my recollection of what you said. Do you wish to change your testimony?

A. If that is what I said I will let it stand.

Q. In other words, you do not know if there are fewer single store operators today than there were in 1950; isn't that right?

A. Would that be stores that have closed or stores that might have opened in that time? That I don't know.

Q. You don't know whether there have been more openings than closings, in other words; is that right?

A. No, I don't.

Q. Did the Dave Marias Market go out of business more than ten years ago?

A. Yes, he did.

Q. More than 20 years ago? Would it be 1943?

A. I don't know the exact date but I would say it is in that vicinity.

Q. Did the Tower Market go out of business more than ten years ago?

A. Yes.

Q. More than 20 years ago?

A. I can't recall that.

Q. Somewhere between 10 and 20 would you say would be a fair estimate?

[fol. 1266] A. I would say.

Q. So the only independent store that has gone out of business in your community since 1950 is Long's; isn't that right?

A. Is that in my immediate vicinity?

Q. Yes.

A. I believe so.

Mr. Vaughn: I have nothing further.

Mr. Knight: I have no further questions.

(Discussion off the record.)

Mr. Knight: Mr. Rubin, would you be agreeable to waiving signature to your deposition and that it may be filed?

The Witness: Yes.

Mr. Vaughn: We will stipulate to the waiver.

[fol. 1266a] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES H. CARR, Judge Presiding

No. 336-60-CC Civil

[Title omitted]

Transcript of Proceedings—June 11, 1963

Place: Los Angeles, California

* * * * * * *

[fol. 1267] TESTIMONY OF FRANK RUSH

If subpoenaed to testify, Frank Rush would testify as follows:

1. He was the owner of the Prospect Store, 7538 E. Garvey Boulevard, South San Gabriel, Los Angeles County, California. He operated this store for approximately sixteen years. He has 32 years of experience in the grocery business. In 1959, the Prospect Store had about $180,000 in sales. He is presently the Business Manager, Grocery Department, Crown Hotel & Restaurant Supply Co., located at 1368 N. Lake in Pasadena, California.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, Mr. Rush closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store Age," and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the [fol. 1268] witness would testify that in the period since 1950 the number of single store grocery retailers operating

in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that single store operators cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result fewer grocery stores are needed in the area to serve a comparable [fol. 1269] number of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from Certified Cooperative and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such highly perishable products as fresh dairy, meat and produce items. However, he

would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution systems. Thus they have combined the advantages of the cooperative with direct purchasing and a highly developed distribution system. In addition some [fol. 1270] of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the picture presented in the defendants' exhibits which show that in the period between 1950 and 1958 the market share of the eight largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the nine largest chains increased from 34.3 per cent to 41.7 per cent; the market share of the fifteen largest chains increased from 38.4 per cent to 50 per cent; and the market share of the twenty largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

9. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis; that they played a part in the competitive merchandising of groceries in the area; [fol. 1271] that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

10. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair, and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated

as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for new locations is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same lines and the stores are known as "Von's-Shopping Bag."

12. He would also testify there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

13. He would state that if this merger of Von's and Shopping Bag is permitted there will probably be subsequent mergers between and involving the other major [fol. 1272] chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1273] TESTIMONY OF JACK SWERDLICK

If subpoenaed to testify, Jack Swerdlick would testify as follows:

1. He is the owner of Value Ranch Market, 3751 East Olympic Boulevard, Los Angeles County, Los Angeles, California. He has been in the grocery business for over twenty years. In 1959, Value Ranch Market had grocery sales of about $375,000.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which his customers

are apt to read. Therefore, Mr. Swerdlick closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local pepers. He subscribes to the Key Services and follows the prices of all of the major chains appearing in those booklets. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store Age" and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the witness would testify that in the period since 1950 the [fol. 1274] number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that a single store operator cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result, fewer grocery stores are needed in the area to serve a comparable number of people.

[fol. 1275] 6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that

he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from Certified Cooperative and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such major products as dairy, meat and produce items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution system. Thus, they have combined the advantages of Certified with direct purchasing and a highly developed distribution system.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles [fol. 1276] metropolitan area, he is in agreement with the defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.3 per cent to 41.7 per cent; the market share of the 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

9. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part

in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

10. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha [fol. 1277] Beta, Mayfair and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same lines and the stores are known as "Von's & Shopping Bag."

12. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of Von's, that the competition which Von's faces has not been "cut throat" or "devastating" and that there are no "intense price wars." He would testify, however, that he faces very vigorous competition from Von's.

13. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

14. He would state that if this merger of Von's and Shopping Bag is permitted, there will probably be subse- [fol. 1278] quent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1279] Deposition of JACK SWERDLICK, taken on behalf of defendants, at 433 South Spring Street, Los Angeles, California, commencing at 11:15 A.M., Tuesday, April 23, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

JACK SWERDLICK, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Vaughn:

Q. Would you state your full name for the record?
A. Jack J. Swerdlick.
Q. What is your home address, sir?
A. 8550 West Sawyer.
Q. Is that in Los Angeles?
A. Los Angeles.
Q. How old are you?
A. Fifty-two.
Q. Do you have an interest in the Value Ranch Market at 3751 East Olympic Boulevard, Los Angeles?
A. Yes.
Q. Does anybody else have an interest in that market?
[fol. 1280] A. Yes, my brother-in-law. We are co-partners.
Q. Is that Louis Silver?
A. Right.
Q. My information is, sir, that you began to work in that market as an employee in 1951; is that right?
A. Well, I wasn't working as an employee, I was working as a part owner.
Q. That commenced in 1951?
A. 1951, yes.
Q. Prior to that time had you had any experience in the Grocery business?
A. Yes. I was—We had a store on Central Avenue and one on Vernon and Western.
Q. Was that prior to 1951, both stores?
A. Yes.
Q. When you say "We," who do you mean?

A. Mr. Silver.

Q. Did Irving Silver have an interest in the business in 1951?

A. Yes.

Q. Is he Mr. Louis Silver's brother?

A. Correct.

Q. Were you active in the business prior to 1951?

A. What do you mean by "active"?

Q. Did you work there every day?

[fol. 1281] A. Oh, yes, yes.

Q. How many years have you worked in the grocery business?

A. I have been in the grocery business, oh, I would say approximately close to 20 years.

Q. Always with Mr. Silver?

A. Well, I have been with Mr. Silver since 1946.

Q. You first operated what store? Commencing in 1946 what store were you operating?

A. That was on around the 1800 block Central Avenue.

Q. In East Los Angeles?

A. Yes, that would be East Los Angeles.

Q. You operated along with Mr. Silver from 1946 until when?

A. It must have been a couple of years.

Q. Until about 1948, something like that?

A. Yes, something like that.

Q. Then did you move your operations to another store?

A. Mr. Silver—At the Central, and at the next one they sold the one on Central and they bought one on Western and Vernon. Now, I was only—I had a small share in it at that time.

Q. But in about 1948 they sold the one at 18th and Central and bought a store at Western and Vernon?

A. Right.

[fol. 1282] Q. How long was that store operated by you and the Silvers?

A. Close to three years.

Q. From 1948 to about 1951, something like that?

A. Yes.

Q. Then from 1951 you have owned and operated the Value Ranch Market?

A. Right.

Q. Is there still a market being operated at the 18th and Central location?

A. No. It's a tire shop now.

Q. When did it become a tire shop, do you know?

A. Well, I would say about four or five years ago at least.

Q. It was operated as a market after the time that you sold it?

A. We sold it and they operated it as a market, yes.

Q. About how large was the market at 18th and Central?

A. Well, it wasn't too large. I couldn't tell you by square feet. Oh, it did about—I could tell you the volume of business it did. That market did about $3500 or $4000 a week.

Q. Would you say it was a mom and pop type store?

A. Yes.

Q. The one on Western and Vernon, is that still being [fol. 1283] operated as a market?

A. Yes, it is.

Q. By whom, do you know?

A. The last I heard there is some Japanese people operating that market.

Q. How is that in terms of size?

A. Well, that would be in between, a little bit bigger than a momma and poppa store.

Q. But somewhat bigger than the 18th and Central Avenue store?

A. Yes.

Q. The Value Ranch Market, how big is that?

A. Well, that is a medium size store. Nowadays you would call it maybe—eight or ten years ago it was considered a pretty good market, now it's a good sized momma and poppa store, according to the reaction or according to the way everybody has been built up. I would call it that.

Q. Let us talk for a minute about your Western and Vernon Market. How far away was that from Vermont and Vernon?

A. Oh, I would say probably eight or ten blocks.

Q. Are you familiar with the Vernon and Vermont Market?

A. Your next large intersection is Vermont west of Western.

[fol. 1284] Q. Are you familiar with the Vernon and Vermont Market?

A. No. At present?

Q. At any time. When you were working down there.

A. Oh, yes, sure.

Q. Do you know Bob Sherry who runs that market?

A. Bob Sherry is the one we bought it from. I am pretty sure it was Sherry. Do you know Bob Sherry?

Q. I know Bob Sherry.

A. Is he a short fellow?

Q. No.

A. Then I don't know him.

Q. He operates the Vernon and Vermont Market at the corner of Vernon and Vermont.

A. This Sherry I was talking about is my size, so it couldn't be the same one.

Q. But are you familiar with the operations of the Vernon and Vermont Market?

A. No.

Q. You don't know anything about it?

A. No.

Q. Do you remember what the gross sales volume in your store was in 1951, that is the volume of the Value Ranch Market?

A. Well, in 1951 I know it was over $400,000. I couldn't [fol. 1285] tell you exactly. You see, I didn't pay too much attention to the books, see. But I know it was over $400,000 a year. I know that for sure.

Q. In 1951?

A. Yes.

Q. What was it in 1962?

A. It must have been—I recall it was about a half a million dollars.

Q. That is an approximate figure?

A. Yes, approximate figure.

Q. What was it in 1962?

A. In 1962 it went down, I think we did about $275,000 something like that.

Q. To what do you attribute the decline in your gross sales over this period of time?

A. Well, it's no question about it. Since we have been there there have been many large chains have moved into

that area. What I mean, the area fairly close by. There was six or seven large chains that opened up. So naturally our business declined. So I would have to attribute it to the opening of the chain stores.

Q. Has there been any change in the character of the neighborhood which you serve?

A. Well, a little bit, yes.

Q. Has it become more commercial and industrial and [fol. 1286] less residential?

A. Not too much industrial, but maybe it was a little more thickly populated. In other words, there was maybe a few that bought homes on the outskirts, you know, veterans and so on. But no industrial went in there in that section.

Q. So one of the reasons why your volume has declined is that population has declined in the neighborhood; isn't that so?

A. Well, it hasn't declined in a certain degree. I will tell you why. You see, in that certain neighborhood most of them are Spanish. Now, when these certain people that moved away there was always new ones that came in. You see, a lot of them come in from Mexico, so I wouldn't say it actually declined in population. But it was a turn-over in the customers. It was a turn-over in the customers.

But as far as population, it is probably the same thing. But, like I say, I phrase it different. Some of our customers moved away and bought homes, but there was somebody that came in and took their place.

Q. Would you tell me the names of the stores that you feel are in competition with you in your particular locality and approximately how far away they are from you?

A. Well, you got the A & P.

Q. How far away is that?

A. It's on Atlantic. Oh, I would say it's about 20, 22, [fol. 1287] 24, something like that.

Q. Twenty-four blocks.

A. Something like that. Twenty blocks, eighteen blocks. Then Von's is in what we call Atlantic Square, or Atlantic Shopping Center.

Q. How far away is that now?

A. That's about 20, 22, 23 blocks, something like that. And then you have Food Giant at about the same distance.

In that area there is about a good five or six new supers that went up there. You have a Thriftimart there, A & P, Food Giant.

Q. About the same distance away?

A. Yes, about the same distance there. And Alpha Beta I would say is maybe ten or twelve blocks, a little further over.

Q. You mean further on from Von's?

A. Yes.

Q. So that would be something like 32-34 blocks away?

A. Something like that.

Q. Any others?

A. Well, let's see. Thriftimart is there, Shopping Bag—I don't recall. Thriftimart is there, Food Giant is there, Von's is there, Alpha Beta is there, A & P. I can recall five. I don't know if there is another one or not. I know [fol. 1288] there is five.

Q. Don't you have some independent stores, that is stores operated by single store operators or other concerns?

A. Well, there is an independent store, they are on Whittier close to Atlantic, the Jonson's Market.

Q. Oh, yes.

A. I believe they own two or three markets. I am not sure.

Q. That is about how far from your store?

A. That is about, I would say, 20 blocks or something like that. Twenty or twenty-two, something like that.

Q. Any others you can think of, whether they are small or big?

A. Well, Safeway opened a store on Brooklyn and Rowan.

Q. How far away is that from you?

A. That is about 15 blocks.

Q. Any others?

A. I don't recall. I don't recall any others.

Q. Let us go back to the A & P 20 blocks away. About when was that opened?

A. A & P I believe was opened between two and a half and three years ago, something like that.

Q. How about Von's.

A. Von's I would say around three years. I would [fol. 1289] say approximately around that time.

Q. I understand these are approximations. The Food Giant, when was that opened?

A. Well, the Food Giant, that was about four years ago. In other words, the Food Giant took it over from McDaniel's. Actually it was a McDaniel's Store but Food Giant took it over.

Q. Thriftimart.

A. Thriftimart I think has only been there about a year and a half the most.

Q. The Alpha Beta 32 or 34 blocks away?

A. They have probably been there a year or a year and a half, something like that.

Q. Jonson's Market has been there under Jonson's name for how long?

A. Under "Jonson" it has been there about a couple of years.

Q. Before that it was an Alpha Beta, wasn't it?

A. Right.

Q. As an Alpha Beta it had been there for many years, had it not?

A. No, no. Alpha Beta bought that from—I believe they bought it from Lucky's. I think Lucky bought out Raisin's and I think they bought it from Lucky Markets.

Q. But as a market——

[fol. 1290] A. It is either Raisin's or Lucky's, one of the two. I know they bought it from them.

Q. But as a market it has been there for a long time?

A. Oh, yes. It used to be a Mayfair Market at one time.

Q. It's an older store?

A. Yes. They have remodeled it but it's an older store.

Q. The Safeway 15 blocks away, when was that opened?

A. That opened about a year ago. That is a new market.

Q. Is it correct to say that your closest competitor is the Safeway 15 blocks away?

A. Yes.

Q. Do you have parking facilities at your store?

A. Some, yes.

Q. About how many cars would your parking lot accommodate?

A. Oh, I would say a dozen cars, maybe 15. Something like that.

Q. Would you say that most of your customers walk to your store?

A. No, no.

Q. Most of them drive to your store?

A. Well, that is hard to tell, when you say that most of them walk. There are some people come and walk, you [fol. 1291] know, if they buy milk or something like that. But I mean as far as grocery order is concerned, they drive.

Q. Generally speaking you serve a lowe income neighborhood; isn't that right?

A. Yes.

Q. Very few of the people in that neighborhood have two cars per family; isn't that right?

A. Well, I would think so that most of them would have one car.

Q. So that the housewife who is near you in the middle of the week who makes her grocery purchases, she probably has to walk to a grocery store, doesn't she?

A. Yes.

Q. Wouldn't you say that most of your business comes from the immediate neighborhood surrounding?

A. No, no. Our business doesn't come from the immediate neighborhood surrounding.

Q. Where does it come from?

A. Well, some of them moved away and some of them come back and some don't. But where they really come from is at the weekend when you try and give them a good ad. There is where they usually from from.

Q. Where do they come from?

A. Well, I would say they come from—Some might come from 30 blocks away, 40 blocks away. Nowadays it is [fol. 1292] hard to tell because they look in the papers, you know and I know, and most people, his wife probably, they look in the paper nowadays. If this husband drives or she drive, they jump in the car. If it's 20, 30, 40 blocks away, if they can get a bargain they just go to that certain store to get the bargain. So in other words, they watch those ads pretty good. Because on the weekends that is where they do most of their shopping.

Q. How do you know that your people come from as far away as 40 blocks?

A. Well, a lot of times you see strange people and after

you have been there a certain length of time you more or less get to know people, or you can tell by looking at them if they were there before.

Q. You know the people that regularly shop your store, don't you?

A. A lot of them, yes.

Q. So if you see a stranger you assume that he came from some distance away to your store; isn't that right?

A. Probably so, yes.

Q. So your regular customers, the people with whom you are acquainted and who shop in your store on a daily basis are those from the immediate neighborhood where your store is located; isn't that so?

A. Well, you see the people in my neighborhood, they [fol. 1293] come in and buy, like I say they will be short of some milk or that. But it hurts to say it, but they still on the weekends they will come in any they will still when it comes to the big orders they don't shop. They shop somewhere else.

Q. A large percentage of your business is made up by these one stop, just fill in shorts, people who want to fill in shorts; isn't that right?

A. That isn't where most of your business would come from.

Q. Where does most of your business come from?

A. Well, most of your business would come from if your customer comes in and buys a basketful of groceries, well, where you can check out a volume of at least $10 or more, then you know you have a grocery order. But if you sell them a loaf of bread or milk, that takes a lot of loaves of bread or milk in order to have any kind of volume at all.

Q. Well, I will get back to this question: How do you know these people who are coming in on the weekends come from 40 blocks away?

A. Well, many of them, you know, you get curious and you ask a lot of them and say, "I haven't seen you before, where do you live?" and they will tell you they live this way and this way, and it is amazing when you find out how far they have traveled or where they live.

Q. Do you have any drive-in dairies near your store? [fol. 1294] A. Yes, yes.

Q. There is one right across the street, isn't there?

A. Right.

Q. How long has that been there?

A. It has been there, I think it is less than a year.

Q. And they sell milk cheaper than you do, don't they?

A. No, no, they don't.

Q. They sell milk at the same price that you do?

A. They sell at the same price.

Q. And they sell other products too, don't they?

A. Yes, they do. In fact they sell bread, they sell weiners, they sell——

Q. Potato chips?

A. Potato chips, yes.

Q. What else?

A. Oh, they sell dairy products. They sell drinks, you know, like punch or a drink or stuff like that.

Q. You are regulated by state law concerning the amount you can charge for your milk, are you not?

A. Sure.

Q. Are you sure that drive-in dairy across the street doesn't undersell you in milk?

A. I am pretty sure.

Q. Have you ever gone over there and checked their prices?

[fol. 1295] A. Yes. In fact I send over to buy milk just for that purpose. Like you say I want to make sure that they aren't underselling me.

Q. As far as you know they are not underselling you?

A. They do not. As I understand, if they did, you know, they could get themselves in trouble. As I understand the milk has to be produced, or don't they have to have a certain —It has to be processed at that certain place before they can sell, or something like that. Anyway, they couldn't sell it any cheaper. I don't know just how the formality is.

Q. That is your understanding that they could not sell any cheaper?

A. That's right.

Q. When that drive-in dairy opened up did it affect your business in any way?

A. Well, it cut down a little on the milk. Most likely it did. But it doesn't affect us any in any other way, as far as like you say potato chips or anything like that.

Q. You think price, I take it, is the important factor in drawing customers to the grocery store, isn't it?

A. Price?

Q. Yes.

A. Definitely, yes.

[fol. 1296] Q. Do you think it is important to maintain a clean and attractive store?

A. Yes, I guess it is.

Q. Do you try to do that?

A. Yes, I do, with the facilities I have. What I mean is I try to keep it clean as far as, you know, dusting or washing the floor. But, of course, the fixtures we have are old fixtures, there is no question about it. It is not modern like some of the chains. We just can't afford to put in—it would take 75 or 100 thousand to remodel the thing and we just haven't got it and we are not in a position to remodel.

Q. But you can still keep old things clean, can't you?

A. Yes. Which we try to do.

Q. Do you think you succeed in that respect? Do you think you have a clean store?

A. Well, as clean as possible we can. We try and keep it clean. It is hard to say. We try and keep it as clean as possible. We see to it that the cans are dusted and, like I say, the floor is washed and that we wipe off the cases and so on. About with what we got to work. But they are old cases, there is no question about it.

Q. And the return bottles are taken out of the way and put in the back of the store?

A. Oh, yes. I don't like to clutter them up.

[fol. 1297] Q. You don't like to have them around the check stands or anything like that?

A. Definitely not, no.

Q. Do you know Yosh Inadomi?

A. Yes, I do.

Q. He runs Jonson's Markets, does he not?

A. Yes, he does.

Q. Have you been in his store?

A. No, I haven't.

Q. You have never been in it?

A. I don't know why I haven't. I should but I haven't.

Q. Do you know whether he operates a successful business?

A. Well, I know he does operate a successful business, there is no question. You've got to give him credit. He

has got a nice store, which I have been told many times. You know the store isn't too old, the one they have. He's got, after all, more modern equipment and all that and he operates a nice store.

Q. He has another store in East Los Angeles, hasn't he?

A. I believe—it's a family affair. There is one on 1st Street.

Q. It is a new building, isn't it?

A. I believe so. Didn't they have a fire there?

[fol. 1298] Q. I don't know.

A. I don't know for sure, but it's a family affair. You see, you've got the one near Soto, you know, and then you have the 1st Street and then Jonson's, the one that used to be Alpha Beta. I guess it's a family affair. They have one on Broadway. It's all a family affair.

Q. They started in business after the war, did they not?

A. I didn't know them before. That I don't know. They must have. Are they Japanese? I really don't know.

Q. Yes, they are.

A. I don't know if they operated before the war or not. They couldn't. I presume they couldn't have done it during the war. But I didn't know them at that time. I got acquainted after we moved into Value Ranch Market.

Q. You say that you cater primarily to Spanish-speaking people; is that correct?

A. Yes. Most of the people around there are Spanish-speaking people.

Q. You offer special products not customarily found in grocery stores in other parts of the Los Angeles metropolitan area that have special appeal for Spanish-speaking people?

A. Well, I really don't know.

Q. Do you offer tortillas?

A. Yes. But it seems to me that most—you take most [fol. 1299] of your stores or chains, as I notice it they might not sell as many tortillas, or have it on the butcher counter, but they do have them in the deli cases. So naturally I know they handle it. I don't think we handle anything special. We might sell a little more Spanish food but I don't think we sell any specialized—we don't specialize in certain Spanish foods that other ones don't have.

Q. Do you promote your Spanish foods? Do you put them on your ads and the like?

A. Not too much, no.

Q. You don't have any special area of your store devoted to Spanish food?

A. Yes. We have a sign, "Spanish Foods," yes.

Q. Is that near the fromt or the back of your store?

A. In the middle of the store.

Q. In what newspapers do you advertise?

A. We advertise in the—that is the Chronicle, the the Wyvernwood Chronicle.

Q. Is that a local paper, that is local East Los Angeles?

A. Yes.

Q. What is it, a throw-away?

A. It's a throw-away.

Q. Do you advertise any other place?

A. Well, I think this Wyvernwood, I think also has [fol. 1300] Gazette, what you a Gazette.

Q. And your ads appear in the Gazette?

A. Sometimes.

Q. When, when you ask for it?

A. We have an agreement if he has space left he will put us in both papers, otherwise we will only run in one paper.

Q. Do you advertise in Spanish?

A. No.

Q. Have you ever heard of a market operator who has a store near a large Spanish speaking population that advertises in Spanish?

A. I don't recall it.

Q. Do you think it might be a good idea?

A. It might be, yes.

Q. Have you thought of it before?

A. We thought of it but we found out the circulation isn't large enough and it would cost us too much money.

Q. To advertise in Spanish instead of English?

A. Yes.

Q. It costs more to advertise in Spanish?

A. We couldn't just advertise it in Spanish alone. We would have to advertise in both. We still have to advertise in this Chronicle besides that.

Q. Will the Chronicle take an ad in part Spanish and [fol. 1301] part English?

A. I don't think so.

Q. Have you ever asked?

A. No, I never asked but I don't think they would. Yo
see, because this Chronicle, they use the facilities of th
Eastside Tribune and I don't know if they could do tha
Q. Mr. Swerdlick, we have been supplied with a copy o
a document entitled "Testimony of Jack Swerdlick." D
you have a copy of that with you?

Mr. Vaughn: Mr. Hughes is now showing him a cop
of the statement.
The Witness: This here, yes.

Mr. Vaughn:

Q. Did you ultimately put your signature on the origin
or any copy of that document?

The Witness: I think I signed a copy with you, didn't
Mr. Vaughn: You may refresh his recollection if yo
wish.
Mr. Hughes: Yes, you did sign it.

Mr. Vaughn:

Q. You read it before you signed it, didn't you?
A. Yes, yes.
Q. Would you look at Paragraph 3 of that statement a
the sentence that reads at the beginning: "On the bas
of his continued study of retail grocery merchandisi
[fol. 1302] in the Los Angeles metropolitan area, the w
ness would testify that in the period since 1950 the numb
of single store grocery retailers operating in the area o
clined." To what area did you have reference in maki
that statement, sir?
A. Well, they declined, I would say the metropolit
area. I would say all over Los Angeles.
Q. The Los Angeles metropolitan area?
A. Yes.
Q. Has there been a decline or increase in the numb
of single store operators in Orange County?
A. Are you talking about independent stores?
Q. Yes.
A. No. There was a decline.
Q. Was there a decline in Orange County?
A. Well, how far is Orange County? How far does
stretch?

Q. Do you know where Orange County is?

A. No. I wouldn't say that I know for sure.

Q. Do you know where the San Fernando Valley is?

A. Yes.

Q. Do you know if there has been a decline in the number of independent grocery stores in San Fernando Valley?

A. Yes.

Q. Since 1950?

[fol. 1303] A. Yes.

Q. How many were there in 1950?

A. Well, as I recall reading an article once, since 1950 to the present time I think it said Orange County, there was about, oh, about 1500 store decline within that period from that time on until now.

Q. In Orange County?

A. Yes.

Q. How about the San Fernando Valley?

A. Well, isn't that Orange County?

Q. Orange County is not in San Fernando Valley. You don't know where Orange County is, do you?

A. No, I don't know how far that stretches, no.

Q. But you do know where the San Fernando Valley is?

A. Oh, yes. Does Orange County stretch, would that take in Long Beach, San Pedro, up to the west side toward the beach?

Q. No. Let me ask you. Do you know where the San Fernando Valley is?

A. Yes.

Q. You do know?

A. Yes.

Q. How many single store operators were there in the San Fernando Valley in 1950?

A. I don't know.

[fol. 1304] Q. How many were there in 1960?

A. Well, I don't know approximately.

Q. How many in 1963?

A. Well, I don't know the amount of stores but I do know like I go and buy the produce in the market, which I will run into certain individuals that own stores, which they went out of business.

Q. Do you ever run into any individuals that have opened up a business?

A. Individuals, no.

Q. You have never heard of anybody opening up a grocery store in Los Angeles and Orange Counties since 1950?

A. Well, I know of one that bought a store but I don't know about opening a store. That is changed hands, an individual.

Q. You don't know of any store that has changed hands since 1950 in the Los Angeles metropolitan area?

A. That changed hands?

Q. Yes.

A. Oh, yes.

Q. How about Jonson's, did they open up after 1950, their first store?

A. Yes. That one on Brooklyn was opened after that, sure.

Q. There is one single store operator that you know [fol. 1305] that opened up a store after 1950, isn't it?

A. Well, like I say, is that the only store he owns? That family, it is hard to tell who owns what. You see, because like I say, it is strictly a family affair. So it's his uncle puts in money, like Inadomi, he is in with his uncle, I believe. He is in with his uncle. So I wouldn't say if that is the only store they own or if he has part ownership in the one on 1st Street, or the Jonson's you know, that one that they bought out Alpha Beta. I really don't know.

Q. Do you know of any store other than the one we have referred to, the Alpha Beta Store, which carries the name Jonson's?

A. The one on Whittier carries Jonson's, the one near Brooklyn and Soto carries Jonson's.

Q. When was the one near Brooklyn and Soto opened for the first time?

A. I believe about three years ago, something like that.

Q. And after that they took over the old Alpha Beta Store?

A. That's right.

Q. The only stores that you know that are named Jonson's were opened after 1950, were they not?

A. Yes.

[fol. 1306] Q. Have you ever heard of Hughes Markets?

A. Oh, yes.

Q. Do you know when Hughes Markets opened its first store?

A. No, I don't.

Q. Do you know if it was after 1950?

A. I couldn't tell you if it was after. I couldn't tell you when they opened.

Q. Have you ever heard of Pantry Markets?

A. I heard of them, yes.

Q. Do you know when they opened their first store?

A. I don't know much about them.

Q. Have you ever heard of Michael's Markets?

A. I don't recall that name.

Q. You don't know that chain. That is understandable because it is in Orange County.

A. Is it?

Q. Yes. You don't know where Orange County is. Are you really able to say, Mr. Swerdlick, that there have been more single store operators go out of business since 1950 than have come into business since 1950 in the Los Angeles metropolitan area?

A. Definitely, no question about it, yes.

Q. What do you base that on?

A. Well, I base it on, the first place you take there is [fol. 1307] a lot of chains that opened up. There is a lot of mergers that have been done. And the chains that opened up opened up great big stores, beautiful stores, you know, over million dollar stores, real large.

And there is no question about it, stores like that that can serve more people and all that took the business away.

Q. So you assume that because these new chain stores have opened up that single store operators have gone out of business?

A. It's not a matter of assuming, it's a fact.

Q. In the immediate area where you have a grocery store are there more or less single store operators now than there were in 1950?

A. There are less.

Q. You tell me the ones that have gone out of business?

A. Well, there was a couple of them that went out. I don't know the name of them. There was a couple of them on Union Pacific that went out.

Q. When?

A. Oh, in the last three or four years.

Q. Did anybody come along to open up that store again?

A. That I don't know. And then there is——

[fol. 1308] Q. You don't know if there is a grocery store there or not; is that right?

A. There is a grocery store on Union Pacific. And then there is one that closed up on Indiana, they went out of business.

Q. Did somebody else come along to operate that store?

A. No, no. In fact it is still vacant at the present time.

Q. Any other?

A. In that neighborhood?

Q. Yes.

A. Well, I don't remember—I know further over, a salesman that comes in, that opened, he had a store. Now, that was in El Monte. That is a little farther. In fact he put in $50,000 and remodeled it and then along came Thriftimart and Von's and the other ones, supers that opened. He had to go out of business.

Q. What was his name?

A. His name was Levy.

Q. Will you define for me what the Los Angeles metropolitan area is? What does it consist of?

A. Metropolitan area?

Q. Yes.

A. It consists of East Los Angeles, West Los Angeles, all the way—that would be all the way to the Pacific Coast [fol. 1309] Highway on one side and up to Hollywood on the other side.

Q. Is that it? Is that what you think of as the Los Angeles metropolitan area?

A. Well, I think San Pedro is considered the Los Angeles area, metropolitan area.

Q. Anything else?

A. And then I believe the beaches. I am not sure if the beaches are considered, like Manhattan, Hermosa. I am not sure if they are or not.

Q. Have you told us about all the stores that have gone out of business since 1950 and they haven't been opened up again as a grocery store in the Los Angeles metropolitan area?

A. Well, tell you about the stores?

Q. Yes. I want to know what are these stores that have gone out of business?

A. Well, there was one fellow at, a couple of stores his name was Bloom. I think it was either Mike or Sid Bloom. He had the store—Now, Inglewood is considered metropolitan. I am sure he had one store in Inglewood and he had one store on Rosecrans, I believe, near Crenshaw, around there. He had to go out of business. He had to close it up. He went broke.

Q. What was the name of those stores?

[fol. 1310] A. I don't recall the names of the stores.

Q. Any others that you know about? He had two stores, didn't he?

A. I believe he had two stores.

Q. So he wasn't a single store operator?

A. No. He had two stores.

Q. Just tell me about single store operators that you know have gone out of business and their store hasn't been opened up again by anybody else.

A. Well, like I say, I knew a couple. I don't know their name. I knew a couple, like I say, from the Valley but I don't know their name. And I ran into—I would say I ran into half a dozen of them in the produce market. But you get to know people but I don't recall the names. You know, you get to know each other, you eat breakfast. But as far as the name is concerned, I don't know the name.

Q. Have you told us now about all the single store operators that you know about that went out of business?

A. That I personally know, yes. Every time you read in your Bulletins, you know, your Merchandiser, Progressive Journal, different ones that tells this and this fellow went out of business, this and that butcher. There was many, many stores. But I just don't recall the names of them.

Q. But you also read in these same papers that people are coming into the business, don't you?

[fol. 1311] A. Yes, yes.

Q. So somebody opened up a market here or somebody bought a market here, you read that all the time, don't you?

A. Yes, you read that all the time. But very few that you will read that individuals opened up.

Q. So it is on the basis of all these things that you con-

clude that there has been a decline in the number of single store operators in the Los Angeles metropolitan area.

A. Yes, yes.

Q. Since 1950?

A. Yes. In fact, you give me a good buyer there will be another decline in me.

Q. Let us talk about that a minute. You almost sold your store in July 1962 to a man named Morris Goldberg; isn't that right?

A. Right.

Q. Why didn't that deal go through?

A. Well, the deal didn't go through, I guess the man, to put it frankly, he just chickened out of the deal. He figured he couldn't handle it. He just couldn't handle it.

We had many people that would come down. And, like I say, they had stores, they just gave it up, looking at it. I don't ask them, how long did you give it up, you know, this and that. But they did have stores that they gave up, [fol. 1312] but naturally they look around, look around. So far we didn't have anybody that would put a down payment on it. If they did, believe me, if we get a chance we would sell it because it's a hard struggle, believe me. I am not making as much as the man working in the store. We put in a lot of hours and if we didn't we couldn't make a living. We would draw our wages.

Q. Mr. Swerdlick, you said earlier that there have been mergers in the grocery business.

A. Yes. Oh, sure.

Q. Would you tell me about those, all the ones that you can remember?

A. Well, I know Thriftimart bought out some, I believe it was Robert's Stores or Fitzsimmons. They bought out some stores. And I think that—Smart & Final, I believe they own part of that. Then Hughes acquired some of the McDaniel's Stores, Food Giant acquired some of the McDaniel's Stores, and, of course, the biggest one was Von's and Shopping Bag, and Food Giant acquired some stores.

Q. From whom?

A. Boy's Market bought some stores.

Q. I asked you from whom did Food Giant buy stores?

A. They bought some from McDaniel's.

Q. McDaniel's?

A. Yes.

[fol. 1313] Q. Boy's acquired some stores, you say?

A. I believe they acquired some of Kory's Stores or Better Foods. I am not sure about Better Foods. I know they did acquire Kory's Stores. And then you had Alpha Beta merging with that Eastern concern, what is the name? You probably know.

Q. Acme?

A. Yes. And then Lucky bought some stores.

Q. Which stores did they buy?

A. They bought some Raisin Stores.

Q. Are you sure it wasn't Alpha Beta that acquired those Raisin Stores?

A. I believe it was Alpha Beta. But didn't Alpha Beta sell some of these back to Lucky? I believe so.

Q. You think that Alpha Beta sold some of its stores to Lucky; is that right?

A. I believe so.

Q. Any others that you can name?

A. Well, the Food Fair just acquired some stores from Fox.

Q. Is that it?

A. That's about as far as I can think at the present.

Q. Do you know whether Thriftimart is now operating any of the stores that were acquired from Roberts?

A. I really don't know.

[fol. 1314] Q. That acquisition was some time ago, was it not?

A. Yes. But I don't think it was too long ago that they merged with—What is it?—Smart & Final?

Q Yes. Let's talk about the Thriftimart-Robert's.

A. That I don't recall.

Q. Isn't it a fact that Thriftimart has sold off many of its Robert's Stores to Thriftimart employees who are now operating them as single store operators?

A. They sold some of their small stores, yes.

Q. Some to some of their employees?

A. That I don't know.

Q. Smart & Final is not in the retail grocery business, is it?

A. No.

Q. It is just a wholesaler of groceries; isn't that correct?

A. Yes.

Q. So Thriftimart in acquiring Smart & Final didn't acquire any retail stores, did it?

A. No, no, no.

Q. You talk about McDaniel's. You are aware, are you not, that McDaniel's three or four years ago was operating a 24 or so store chain?

A. I don't know. I know they had a few stores. I don't know how many.

[fol. 1315] Q. And then they began to get in financial difficulty, didn't they?

A. Yes, they did.

Q. And they started selling off some of their stores to single store operators and small concerns, did they not?

A. I don't recall of any single store operators buying them. Maybe you know. But I know Hughes bought some of them and I know Food Giant did. But I don't know of any single store operator.

Q. How many did Hughes buy?

A. They bought about three or four of them, maybe five.

Q. How many did Food Giant buy?

A. Food Giant must have bought, I think about nine or ten of them. I am not sure now.

Q. McDaniel's by that time was in bankruptcy; isn't that right?

A. They were in difficulty, yes.

Q. In bankruptcy, weren't they?

A. I believe they were, yes.

Q. Was Acme operating any stores in the Los Angeles metropolitan area prior to its acquisition of Alpha Beta?

A. Not that I know of.

Q. Acme is a large national chain, isn't it?

A. It's an Eastern chain, yes.

[fol. 1316] Q. Was Food Fair operating any stores before it took over the operation of Fox Stores?

A. No.

Q. Fox is a chain that started out after 1950, isn't it?

A. Yes.

Q. And they expanded very rapidly?

A. Yes. I know. I remember they had one or two stores, sure.

Q. Maybe they expanded too rapidly?

A. They expanded too rapidly. When he started buying

stores, like take a small operator like me, they couldn't give me those stores.

Q. You wouldn't buy those stores?

A. Of course not.

Q. Bad stores?

A. Yes, they were bad stores.

Q. And pretty soon Fox found itself in financial difficulty and it went bankrupt, didn't it?

A. That's for sure, yes.

Q. And Food Fair is now operating some of the Fox Stores; isn't that right?

A. Yes.

Q. There are a number of Fox Stores, though, that were sold off to small concerns and single store operators; isn't [fol. 1317] that correct?

A. That I don't know.

Q. You don't know whether that is so or not?

A. I know the last article I saw in one of the grocery papers that they took them over, and I don't know how many stores they took over, of course. But they did take over Fox's operation.

So maybe, like you say, maybe some of them they sold which they didn't want.

Q. Food Fair is also a large Eastern chain, isn't it?

A. Yes, it is.

Q. It had no stores in the Los Angeles metropolitan area before it began operating Fox Stores, did it?

A. No, no, it didn't.

Q. Are you a member of Certified?

A. Yes.

Q. Are you able to buy your groceries as cheaply, that is own your groceries on your shelves as cheaply as they can get on the shelves of a chain store?

A. Most of them, yes, I would say so.

Q. By reason of Certified's great volume buying; is that right?

A. That's right, that's right.

Q. So how does the fact that the chains operate their own warehouses give them any advantage over you?

[fol. 1318] A. Well, in the first place you take Certified, there are certain things you can get in Certified. You know, you can't get everybody in Certified to operate the

store. Like you say, your dairy products, your produce, or your meat. You see, they don't handle any of that stuff.

Q. You can buy your dairy products just as cheaply as a chain, can't you?

A. From who, from Certified?

Q. From Golden Creme.

A. No, no, I can't.

Q. How do you know?

A. How do I know? Well, it stands to reason that I know, because in the first place you are talking about a chain and you are talking about me; right?

Q. Yes.

A. You take a chain—You take a large chain like they build their own warehouses. They build warehouses right now where they have carloads of merchandise. They can put in carloads of bananas that goes directly by railroad right into their warehouses. They got the same facilities for their produce or their meat. They also have facilities where they got it all in their warehouses. They got their own trucks, they got their own—everything that is controlled by them. They have their own trucking concerns where they put it on their own trucks, they deliver it to [fol. 1319] certain individual chain stores.

As you take Golden Creme, each one is an individual driver. Now, we buy some bread from Golden Creme or some dairy products. They all belong to the union, they draw big wages, each one is an individual. A bread driver——

Q. Let me interrupt you for just a second so we don't get too far gone. I want you to be able to complete your answer. Doesn't Von's have to pay its drivers union wages?

A. Yes, they do. But Von's——

Q. Doesn't Von's have an overhead in operating that warehouse?

A. They have.

Q. Don't they have to do their own buying when Certified does its buying for you of dry groceries?

A. Yes. But when you have one buyer buying for 70, 80, 90 stores, it's a lot different when you have individuals. Don't forget everything that they do they do volume of buying and they have it in their certain warehouses and where they have all the facilities where it is sold. At those

certain warehouses where they have control of everything. And when all that shipment comes in and they can send it direct, sure, like you say, they belong to the union. But they put it on their own trucks and that saves them a lot of expenses.

Q. You get your dairy products, for example, off a Golden Creme truck, don't you?

[fol. 1320] A. Some. Not all of them.

Q. Do you also have one other dairy?

A. Yes. Knudsen's.

Q. Knudsen supplies you too?

A. Yes.

Q. And Von's gets its dairy products off a Jerseymaid truck, doesn't it? It is not a Von's truck, it is a Jerseymaid truck, isn't it?

A. But the way I understand, I don't know for sure, that Jerseymaid is part of Von's, that they are a cooperative.

Q. You mean that Von's has an interest in Jerseymaid?

A. Yes. That Von's and Market Basket, I believe, and I think Alexander's——

Q. Have an interest in Jerseymaid.

A. —have an interest in Jerseymaid.

Q. And you have an interest in Golden Creme, haven't you?

A. We have stock.

Q. Yes, about $10,000 worth of it, don't you?

A. That's right.

Q. So you have an interest in a dairy just like Von's has an interest in a dairy?

A. Well, it is cooperative.

Q. Jonson's is a member of that same dairy, isn't it?

A. Yes, he is.

[fol. 1321] Q. Food Giant is a member of that dairy, isn't it?

A. Yes, he is.

Q. Do you think that Von's ownership interest in Jerseymaid gives it an advantage over you when you have an ownership interest in Golden Creme?

A. Yes, it does. In the first place the interest I have is a small amount, which don't compare to any big chain, like you are talking, even Food Giant. You know as well as I do how much interest Food Giant got in Golden Creme.

You know they have the biggest interest. There is no question about it.

Q. Sure. They have the biggest volume, too, don't they?

A. Sure, that's right. But we have a small share in it.

Q. Yes. You have a smaller share in it but you can't sell your milk for any less than Von's sells its milk, can you?

A. No, no.

Q. In other words, it is governed by state law and you both sell your milk at the same price, don't you?

A. That's right.

Q. Is there any competitive advantage in terms of getting customers into your store which Von's has over you by reason of the fact that it is in Jerseymaid?

[fol. 1332] A. Yes. Well, you see if you buy a certain volume of milk you pay a less percentage.

Q. You mean they are making more profit on their milk?

A. That's right.

Q. But does that attract any more customers into the store when you have to sell the milk at the same price?

A. No, I wouldn't say the milk at the same price. The only thing is with their volume of buying, you see you are allowed so much off if you buy $10 or you buy $50 or $100. The more you buy the more percentage you actually get.

Q. So for every dollar of milk they sell they get a greater profit than you do.

A. That's right.

Q. And you don't like that?

A. It is not a matter of liking it, it is a matter I envy them. Let's put it that way. It is not a matter of I like it, I envy them. I just can't say I don't like this guy's driving a Cadillac and I've got a Chevy. I would like to have one too. But just the same I don't like it. More power if he can do it. But I can't do it. I am not in a position to do it. With their volume of money they have and with all their facilities they are able to do that which I am not.

You see, since Von's——

Q. There is no question pending, Mr. Swerdlick.

[fol. 1323] Would you look at Paragraph 14 of your statement, just the first sentence will be fine. What did you mean when you said that?

A. In other words, what I meant, if they allow the merger

of Von's and Shopping Bag that there would be more mergers after.

Q. Involving who?

A. Involving different chains.

Q. Which chains?

A. Well, it is hard to say. It could be Food Giant, Thriftimart, Market Basket merging with somebody else.

Q. Who is Food Giant going to merge with?

A. That I couldn't tell you.

Q. You don't know if any of those chains are going to merge, do you?

A. Not offhand, no, I couldn't tell you.

Q. You are speculating that there may be mergers in the future; isn't that correct?

A. It is not a matter of speculating. It would be a fact.

Q. You can state as a fact that other chains are going to merge in the future?

A. Definitely.

Q. Now I want you to tell me who those chains are.

Mr. Hughes: He didn't answer the question. Let the [fol. 1324] witness answer the question.

Mr. Vaughn: Q. If you want to finish your answer, go ahead. You said, "Definitely." Do you have anything else?

A. Definitely if one merger is allowed they are laying —you haven't noticed of late too many mergers. Now, I don't know, it was because of them knowing about Von's and Shopping Bag—I don't know if they know that Von's and Shopping Bag, that the government is taking them to court, or whatever it is. Now they are probably waiting to see how Von's and Shopping Bag come out. And if Von's and Shopping Bag can get away with it they figure they can do it too.

Q. What is the basis for your information, who have you talked to, and who told you that?

A. My basis is from the things that what actually already happened.

Q. Now I want you to tell me what chain is waiting for this case to be over before it merges. You tell me which chain.

A. I couldn't commit myself to name any certain chain.

Q. Because you don't have any idea what chain is waiting to merge as soon as this case is over; isn't that right?

A. No, I couldn't really point my finger on a chain and say that this chain is going to merge.

[fol. 1325] Q. Of course not.

A. No, I couldn't just lay my finger on it, no. But I know that it will happen. There is no question about it.

Q. You can be specific but you can just say you think it is going to happen; isn't that right?

A. It is going to happen because it has been happening.

Q. And you wouldn't say that you were speculating?

A. Pardon me?

Q. You wouldn't say you were speculating; is that right?

A. I expect?

Q. You were speculating.

A. No, I wouldn't say I am speculating. I would say it's a fact that would happen.

Q. Have you noticed any changes in grocery retailing in the last three years?

A. Yes, I did notice. There is changing. Now, when Von's was operating as Von's, before Von's and Shopping Bag, they stood in line pretty fair. Now when they merged with Von's and Shopping Bag after a short period of time all their prices on the floor were knocked down. They started advertising that, the lowest shelf prices, and they did lower the prices.

You take all your, you know, your main products, they [fol. 1326] lower. Your baby food, your canned milk, your coffee, soups and all that, they went way down. And naturally the other chains followed them.

When that happens, like I will give you an illustration. Now you've got Von's right now selling bread five for a dollar, the ad was in yesterday's paper. Five fifteen and a half ounce loaves for a dollar. Now, they are the lowest. Now what am I supposed to do? If I don't try to follow in some other respects up to Von's I am going to lose more business. Now, Von's is able to do that. They have a beautiful big bakery when they merged with Shopping Bag, which Shopping Bag has a beautiful big bakery. They can do it.

Q. Have you ever seen that bakery?

A. No, I haven't been by it but I have heard it's a beautiful, beautiful bakery. I heard that it is one of the finest there is. That I did hear.

If I would sell five loaves for a dollar, they sell fifteen

and a half ounce loaves and I sell fifteen ounce loaves, the price is 27. Now, I couldn't sell it for that price because I would be losing money on the bread.

Q. Have you heard about discount houses selling food?

A. Yes.

Q. They sell for cheaper prices than the conventional supermarket?

[fol. 1327] A. They do, yes, they do.

Q. Are there any discount houses in your area?

A. Not close by. Well, there is a discount house, like I was talking about 25-30 blocks away. There is one there.

Q. What is the name of that?

A. I forgot the name of it. It is right near—You probably know the name of it.

Q. No, I don't.

A. I know it's on Whittier. Now, I don't know the name. I did know but I forgot the name of it.

Q. The sale of foods through discount houses is a relatively new development in grocery retailing, is it not?

A. Yes.

Q. Something that has happened in about the last three years?

A. That's right.

Q. You also know of the bantam stores that have sprung up around Los Angeles?

A. I have heard of bantam stores. Mostly I heard about on the outskirts, like Long Beach. I have heard of them. I don't know just how many or where they are located. I did hear of some bantam stores, yes.

Q. Are there any liquor stores in the general area where you compete?

[fol. 1328] A. Liquor stores?

Q. Yes.

A. Yes, we have one on the corner.

Q. Does it sell any food items?

A. No.

Q. Do any of the liquor stores that you know about in the general area where you are sell grocery items?

A. No, not that I know of, no.

Q. You don't have any. Do you know of any place in the Los Angeles metropolitan area where liquor stores are commencing to sell more and more groceries?

A. Yes. They sell groceries, deli, yes. A lot of them are doing it, yes.

Q. Have you seen some of those stores?

A. Yes, yes. Some of the newer ones that opened up I did see.

Q. You are generally familiar with their operations, are you not?

A. Yes. To a certain extent, yes.

Q. Wouldn't you say that some of those liquor stores sell more grocery products than the average mom and pop store?

A. Well, that I don't know. I couldn't tell you.

Q. You have been in an average mom and pop store, haven't you.

[fol. 1329] A. Yes.

Q. A small, little store?

A. Yes. I suppose some do sell. That I couldn't tell you. They probably sell more deli but I don't know about groceries. That I couldn't tell. But they probably sell more deli because they get in a couple of nice, you know, two or three frozen food cases and they attract attention, you know, for frozen foods. But I couldn't tell you about dry groceries.

Q. How many grocery items do you handle in your store?

A. I couldn't tell you how many grocery items we have. I just couldn't tell you. I know we have a full line as possible to compete with any other store, you know. We might not have certain fancy items, but in general we have what the next store has.

Q. Visualize an area ten blocks around your store. What percentage of that area is residential?

A. Oh, about 80, 85 per cent.

Mr. Vaughn: I have nothing further.

(A short recess was taken.)

Cross-examination.

By Mr. Hughes:

Q. Mr. Swerdlick, you refer to bantam stores in your testimony. What is a bantam store?

[fol. 1330] A. Well, a bantam store, to my estimation, a bantam store has a certain amount of groceries. I don't think they carry a full line. They just carry a certain amount of groceries and it's a small store.

Q. Are they any different from a mom and pop?

A. Not too much different, no.

Mr. Hughes: I have no further questions.

I would just like to have marked for identification an exhibit entitled "Testimony of Jack Swerdlick" as Swerdlick Exhibit No. 1.

(The document referred to was marked by the notary public as Swerdlick Exhibit No. 1 for identification, a carbon copy of which is attached hereto.)

Mr. Vaughn: I have nothing further.

Mr. Hughes: Mr. Swerdlick, if it is agreeable to counsel for Von's and the government, would you waive signing the deposition that the reporter has taken down? Would you forego signing it if we agree that it is correctly recorded?

The Witness: Yes.

Mr. Hughes: Does counsel for Von's agree?

Mr. Vaughn: Yes.

[fol. 1331] TESTIMONY OF JOHN TAYLOR

If subpoenaed to testify, John Taylor would testify as follows:

1. He is the owner of Johns Market, 720 North Tyler Avenue, El Monte, Los Angeles County, California. He has been in the grocery business for about 17 years and has operated Johns Market for 4 years, with the exception of a period of less than a year when he had subleased the operation to another party. His sublessee failed in his payments and Johns Market reverted to Mr. Taylor. The sales of Johns Market in 1959 were about $845,000. Prior to the

reversion of the premises, he had operated the store under the name "Commonwealth Market."

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles Metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, Mr. Taylor closely inspects all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviews grocery advertising appearing in local papers. He subscribes to the "Key Services" and follows the prices of all of the major chains appearing in that booklet. In keeping abreast of the retail grocery trade generally, he regularly reads, among other publications, the "Commercial Bul- [fol. 1332] letin," "Super Market Merchandising," "Chain Store Age," and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles Metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that a single store operator cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result, single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of gro- [fol. 1333] cery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding dollar sales. The large supermarkets today serve many more people than they did in the past. As a result,

fewer grocery stores are needed in the area to serve a comparable number of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at those warehouses, and operate large trucking facilities. As a result, they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from Certified Cooperative and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such major perishable products as fresh dairy, meat, and produce items. However, he would testify that large chains, such as Von's and Shop-[fol. 1334] ping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing and distribution system. Thus, they have combined the advantages of the cooperatives with direct purchasing and a highly developed distribution system. In addition, some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles Metropolitan area, he is in agreement with the picture presented in defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 percent; the market share of the 9 largest chains increased from 34.3 percent to 41.7 percent; the market share of the 15 largest chains increased from 38.4 percent to 50 percent; and the market share of the 20 largest chains increased from 40.5 percent to 54.4 percent. When shown the tables prepared from the Bureau of Census reports by the Govern-

ment economist, he would testify that these figures also corroborate his own understanding, based upon his experience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on [fol. 1335] the sales of the largest chains.

9. He would state in his testimony that he observed the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

10. He would state that Von's and Shopping Bag, along with Ralphs, Safeway, Market Basket, Thriftimart, Alpha Beta, Mayfair, and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for new locations is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the same line and the stores are known as "Von's-Shopping Bag."

12. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of [fol. 1336] Von's, that the competition which Von's faces has not been "'cut throat" or "devastating" and that there are no "intense price wars." He would testify, however, that he faces very vigorous competition from Von's.

13. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

14. He would state that if this merger of Von's and Shopping Bag is permitted, there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery

chains will dominate retail grocery distribution throughout the Los Angeles Metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles Metropolitan area.

[fol. 1337] Deposition of JOHN TAYLOR, taken on behalf of defendants, at 433 South Spring Street, Los Angeles, California, commencing at 2:00 P.M., Tuesday, April 23, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to subpoena and notice.

JOHN TAYLOR, having been first duly sworn, deposed and testified as follows:

Mr. Coyle: I think Mr. Taylor had some corrections in the first paragraph of his statement, something to do with selling the stores or something like that. Perhaps he could make them right now.

Mr. Bates: I will be glad to do that.

Direct examination.

By Mr. Bates:

Q. Are they written out?

A. No, sir.

Mr. Coyle: It is Paragraph 1.

The Witness: Wherein it states that I am the owner of John's Market at 720 North Tyler, El Monte, it should be corrected that I am president of Big Dollar Markets No. 2, Incorporated, which is the owner of John's Market, and the address should be corrected from 720 North Tyler to [fol. 1338] 4022 North Tyler.

It further states that I had sublet the operation to another party. Actually I made a sale of equipment and merchan-

dise to another party. Subsequently he went bankrupt. I was on the fixture contract and therefore stepped back into the picture and re-opened the operation.

Mr. Bates: Q. I had that information and I was going to ask you about it.

Just as a predicate to this hearing this afternoon I would like to say that by reason of your 17 years of experience in the grocery business the government has proposed you as being one qualified to express an opinion as to the effect of the Von's merger on the grocery market business in the metropolitan area of Los Angeles.

This hearing is designed to give me, as one of the attorneys for Von's, an opportunity to examine you concerning the experience that you have and the opinions which you have expressed in this statement. You have that statement before you, Mr. Taylor?

A. Yes, sir.

Q. I will refer to it from time to time for the purpose of asking you to refresh your recollection as to what it contains.

John's Market, as you have just told us, is owned by Big Dollar Markets No. 2, Inc.; is that correct?

[fol. 1339] A. Yes, sir.

Q. You are the sole stockholder in control of that corporation, are you not?

A. I am.

Q. What proportion of the authorized and issued stock do you own in that corporation?

A. We have 101 issued shares, of which I have 100.

Q. In 1961 you sold that market to a Mr. Kuhn, did you not, for $91,000?

A. Yes, sir.

Q. You received payment of $41,000 down and the balance of the purchasing price was carried over a term of five years; is that correct?

A. I am not sure about the length of the contract. It wasn't with myself, this contract was held by the Security Bank and various other companies.

Q. What is your best recollection as to the terms and conditions of the sale that you made to Mr. Kuhn?

A. This cash amount, which was approximately $41,000, and assumed the balances due on the equipment contracts.

I don't recall exactly how much they were but it must have been approximately 50,000.

Q. You stated that there was a default in the contract and that you took the store back. Was that in January 1962?

A. Yes, sir, January 1st.

[fol. 1340] Q. Is that the first time that you operated that market under the name of John's Market?

A. Yes, sir.

Q. Prior to that time it had been operated under what name?

A. Commonwealth.

Q. When did you first acquire or when did the Big Dollar Market Corporation first acquire the Commonwealth Market?

A. I believe it was in February 1959.

Q. From whom did you acquire it?

A. An individual by the name of Herbert Sercombe.

Q. What did you pay Mr. Sercombe for that market?

A. I don't recall the total figure, but actually I purchased his equity. It seemed to me like somewhere around six to seven thousand and I assumed his contracts.

Q. Six to seven thousand dollars and do you recall the dollar amount of the contracts assumed?

A. I would say it was about 25,000.

Q. Did this include the inventory?

A. No, sir.

Q. How much inventory did you purchase at that time?

A. I don't recall, sir.

Q. Would you approximate it?

A. I would say approximately 17 to 20,000.

[fol. 1341] Q. Then it would be fair to say, wouldn't it, that your total purchase price was approximately 48 to $50,000, that is made up of the six that you paid plus $25,000 for the contracts and plus $17,000 of inventory? That makes $48,000. So 48 to 50 would be approximately the purchase price?

A. Yes, sir.

Q. Is that as near as you can recall the figures?

A. I think so.

Q. What month in 1959 did you acquire that store?

A. February.

Q. What month in 1961 did you sell it to Mr. Kuhn?

A. April.

Q. So you actually operated it for a period of approximately two years.

A. Yes, sir.

Q. Do you have service meat in that market, or did you at that time?

A. No, sir.

Q. Did you have a meat market?

A. The meat market was leased at that time.

Q. How about produce, did you operate the produce department?

A. I did.

Q. And the grocery department?

[fol. 1342] A. Right.

Q. Did you have a liquor department?

A. No, sir.

Q. The lessee of the meat department ran a service meat department, didn't he?

A. No, sir.

Q. Was it packaged meat?

A. Packaged.

Q. Who was the lessee?

A. His last name was Bartlett. I don't recall his first name.

Q. What he the lessee for the two-year period in which you operated the market?

A. No. I think it was about six months or so and he sold it. He sold the meat department.

Q. Assigned his lease, did he, with your consent?

A. Yes.

Q. Who took it over?

A. A partnership of Salie and Carlucci.

Q. Did they continue to run it for the remainder of the two-year period that you operated it?

A. Not entirely.

Q. Tell me the circumstances.

A. I think they had one year. They did have one year.

Q. Mr. Taylor, how big is this market in terms of square [fol. 1343] feet?

A. Are you referring to selling area?

Q. What?

A. Are you referring to selling area or total?

Q. Total area.

A. Total building area? About 11,000, something like that. Under 12,000.

Q. Would you call this a supermarket?

A. No, sir.

Q. What would you call it?

A. I would call it a large neighborhood store.

Q. What do you consider your draw area was in that store, in terms of radius of miles around the store?

A. A mile and a half.

Q. What percentage of your sales would come from within that draw area, if you know?

A. I do not know.

Q. Would you approximate 90 per cent, 95 per cent?

A. It would only be an approximation. Probably 90 per cent.

Q. Are there any other single store or independent operators within that mile and a half area?

A. Yes, sir.

Q. Would you name them for me?

A. The nearest one is called the Circle Market on Tyler.

[fol. 1344] Q. The Circle Market? Let's see, the Circle Market is located at 4376 Tyler Avenue, isn't it?

A. I believe so.

Q. That would be just about three blocks from you?

A. Yes, sir.

Q. What direction is the Circle Market located?

A. North.

Q. By the way, do you know the owners of the Circle Market, Mr. and Mrs. Horner?

A. I read an article about them today. That is the first time I knew the name.

Q. Was that article in the Food Mart News?

A. Whatever came in the mail today. I think it was. Yes, it was. That is the one that has the new method of printing. That is the Food Mart News.

Q. Do you subscribe to that magazine?

A. No, sir.

Q. What other stores are north of your store within that radius of a mile and a half?

A. I am not sure of the pronunciation, but there is one on

the corner of Lower Azusa and Tyler, it is just off the corner, I think it is called Nagai Ranch Market.

Q. How big a market is that? As big as yours?

A. No, sir.

[fol. 1345] Q. Is it an independent operated store?

A. As far as I know it is, yes, sir.

Q. It is a single operation, just the one store operation?

A. As far as I know.

Q. Anything else north of you?

A. As to independents?

Q. Well, give me the independents first because I am going to ask you about any chain operations within this radiu. I would like to have the independents first.

A. I don't believe so directly north, no, sir.

Q. What about south of you?

A. South they have one called the Key Fair Market.

Q. How big is that market?

A. I believe it is 9,000 square feet.

Q. Is that also a middle sized neighborhood market?

A. I would say it is the same category as my own, what I call a large neighborhood store.

Q. How far from your store is this?

A. I would say less than a mile.

Q. How long have they been in business, if you know?

A. I don't know, sir.

Q. Have they been in business all the time that you have been out as John's Market?

A. Are you referring to this last period?

[fol. 1346] Q. This Key Market.

A. Right.

Q. Wait a minute. I am referring to the entire period from when you first bought the store to the present time.

A. I believe it has been under two or three ownerships and was closed for one period.

Q. For what period was it closed?

A. I don't know, sir. I don't recall.

Q. Anything else south of you?

A. There is a very small neighborhood store, what might be considered slightly south a couple of blocks and a couple of blocks east, but I don't know the name of it, on Clark Street.

Q. A couple of blocks east of you, you say?

A. South and east.

Q. On Clark Street?

A. Yes, sir.

Q. What else is east of you?

A. I know there are three or four stores east but I couldn't tell you the location or streets. They are small Spanish type markets.

Q. You don't consider them competition to you, though, do you?

A. I consider everyone competition to me that is in my radius that I draw customers from.

[fol. 1347] Could you describe those three or four small Mexican stores a little better for me?

A. No, sir.

Q. Are they mom and pop variety?

A. I would say so.

Q. How about west of you in your draw area?

A. We have a natural barrier to the west. I really don't consider anything to the west, although there might be stores within this radius. We have a river bed and airport and it isn't accessible.

Q. What is this natural barrier?

A. There is a river bed and an airport.

Q. Then you seldom have any customers come from the west to your store because of that barrier; is that true?

A. I can't state where my customers come from, all of them.

Q. When did you first get started in the grocery business, Mr. Taylor?

A. 1946.

Q. Where did you first work in this business?

A. Santa Barbara.

Q. In what capacity?

A. I acquired a very small neighborhood store.

Q. How long did you operate that?

A. About two years.

Q. What happened to it?

A. I sold it.

Q. Did you sell it for more than you paid for it?

A. Yes, sir.

Q. Did you operate it profitably that two-year period?

A. Yes, sir.

Q. Do you recall what you paid for it and what you sold it for?

A. I paid $3,000 for fixtures plus inventory.

Q. What did you sell it for?

A. I believe it was around 5,000.

Q. Plus inventory?

A. Yes, sir.

Q. Approximately the same amount of inventory or was it more?

A. I would say the same amount, approximately.

Q. Then what did you do when you sold this store?

A. Moved to Los Angeles.

Q. That would be 1948 or '49?

A. Well, I believe it was in '49.

Q. Did you go into the grocery business again in Los Angeles?

A. Yes, sir.

Q. Where was this?

[fol. 1349] A. 93rd and Avalon Boulevard.

Q. In what capacity did you operate there? Did you buy the store?

A. Yes, sir.

Q. Using the gains and profits from the sale of the Santa Barbara store in part, I take it?

A. Yes, sir.

Q. Do you recall what you paid for the 93rd and Avalon store?

A. Two thousand.

Q. Plus inventory?

A. It could be three. I am not sure.

Q. Plus inventory?

A. Yes, sir.

Q. How long did you operate that store?

A. Not very long. I believe about six months, maybe a little longer.

Q. Did you sell that one?

A. Yes, sir.

Q. What did you sell it for?

A. $5500 plus.

Q. Did you operate it successfully when you were there the six months?

A. Yes, sir.

Q. After leaving 93rd and Avalon where did you go?
[fol. 1350] A. I then took about six months out and worked for Market Basket Stores.
Q. In what capacity?
A. Clerk.
Q. Six months, you say?
A. I believe so, yes, sir.
Q. You left Market Basket for what other job?
A. To manage a small independent in Alhambra.
Q. What is the name of that?
A. It was known as the Westmont Market.
Q. Who opened that store?
A. The last name was Tenney.
Q. Was it a single store operation?
A. Yes, sir.
Q. Where was it located?
A. On West Main Street.
Q. What town?
A. Alhambra.
Q. How long did you manage that store?
A. I honestly don't recall. Not too long. Probably no more than six months, if that long.
Q. It was a single store operation, wasn't it?
A. Yes, sir.
Q. After you left Westmont Market where did you go?
A. I spent a month, maybe two months, at a Thriftway
[fol. 1351] Market.
Q. What that a single operation?
A. Yes, sir.
Q. In what capacity did you work there?
A. Manager.
Q. Two months?
A. Two or three months, yes, sir.

Mr. Knight: Excuse me, Mr. Bates, but could you place the year of Westmont?

Mr. Bates: Q. In what year did you work at Westmont Market?
A. I believe 1950.
Q. What year did you work as manager of Thriftway Market?
A. During the same year.

Q. Then when you left Thriftway what did you do?

A. I bought a market at 75th and South Broadway in Los Angeles.

Q. What was the name of that market?

A. It was called Nogler's Market.

Q. Was that the name of the people from whom you purchased it?

A. Yes, sir.

Q. Did you change its name?

A. Yes, sir.

[fol. 1352] Q. What did you change it to?

A. Farm Fresh.

Q. To this point you seem to be successful as a single store operator and also in being able to make a little money in buying and selling. So I would like to ask you the same questions about this, Mr. Taylor, what did you pay for this store?

A. I paid Mr. Nogler $100 for his interest.

Q. How much?

A. $100. But I leased the fixtures from, I don't recall the name of the man who had the meat department at the time, who had the master lease on the building. I obtained an option to buy and I do not recall the purchase price at this time.

Q. You obtained an option to buy from the landlord or from Mr. Nogler?

A. No, from the master tenant—the former master tenant.

Q. There was an option to buy the fixtures or the building?

A. The fixtures.

Q. You got an assignment of the lease, I suppose, from Mr. Nogler; is that correct?

A. Yes, sir.

Q. How long did you remain in this location?

[fol. 1353] A. About two years.

Q. How large a store was this?

A. About 3500 square feet.

Q. When you paid Mr. Nogler $100 you also paid him an additional amount for inventory, didn't you?

A. Yes.

Q. It was $100 plus inventory?

A. Yes, sir.

Q. Did you sell that store at the end of two years?

A. Yes, sir.

Q. What did you sell it for? Let me strike that.

How much did you sell it for?

A. That is going way back. I believe around $9500.

Q. Plus inventory?

A. Plus inventory.

Q. It is true, isn't it, that you also operated that store profitably during that two-year period of time?

A. Yes, sir.

Q. Did you sell that store along toward the end of 1952 or was it before part of '53?

A. I believe that it was June or July of '53.

Q. What did you do after selling the 75th Street store?

A. I took a vacation. It's about time.

Q. Were you out of business any considerable length of [fol. 1354] time?

A. Until November, as I recall.

Q. And when you returned from your vacation in November did you go back into business?

A. Yes, sir.

Q. In the grocery business?

A. Yes, sir.

Q. Tell us about it. What did you do?

A. I bought a market on Firestone Boulevard in South Gate.

Q. That is November 1953, Firestone in South Gate. What was the name of that market?

A. It was called Floyd's Market.

Q. Did you continue to operate it under the name of Floyd's, or did you change the name?

A. I changed the name.

Q. To what?

A. Lloyds.

Q. L-l-o-y-d-'-s?

A. Yes, sir.

Q. What did you pay for that market, Lloyd's Market?

A. I believe about seventeen thousand plus inventory.

Q. Getting a little bigger and better all the time, aren't they?

A. Yes.

[fol. 1335] Q. How long did you operate Lloyd's Market?

A. Three and a half years.
Q. Did you operate successfully?
A. Yes, sir.
Q. Did you sell that at the end of three and a half years?
A. Yes, sir.
Q. How much did you sell it for?
A. First I will go back a little ways. I acquired two more markets during this period.
Q. In the three and a half year period?
A. Yes, sir.
Q. Tell us about those.
A. I acquired one at State and Gage in Huntington Park.
Q. What was the name of that market?
A. Foodville, I believe.
Q. What did you pay for that one?
A. $9500.
Q. Plus inventory again?
A. Plus inventory.
Q. How long did you operate it?
A. About two years.
Q. What was the size of the market?
A. About 4500 square feet.
[fol. 1356] Q. It was a complete market, wasn't it, service, meats, produce, groceries?
A. Service meat, produce and groceries, yes.
Q. Any wine or beer?
A. Liquor.
Q. How long did you keep that market?
A. Until 1956, I believe November. I had it two years, yes.
Q. Do you remember what month in 1956 you sold it?
A. I gave possession in November. I sold it six months prior on an option.
Q. What was the sales price?
A. Forty thousand.
Q. Plus inventory?
A. Yes, sir.
Q. This $40,000 was just the one store named Foodville?
A. Yes, sir. I named it Lloyd's Market. It was originally Foodville.
Q. You named it Lloyd's too?
A. Yes, sir.

Q. That gave you two stores at that point that were being operated as Lloyd's?

A. Yes, sir.

Q. Now, the first Lloyd's you paid $9500 for that plus inventory.

A. Well, the first one about 17,000.

Q. I beg your pardon, that is correct. I am not reading my notes correctly here. You paid $17,000. And you operated that three and a half years and sold it. What was the sales price?

A. $70,000.

Q. You purchased the Lloyd's No. 2 then before you sold Lloyd's No. 1, didn't you?

A. Yes.

Q. What year did you sell Lloyd's No. 1?

A. 1956.

Q. What month?

A. I believe it was May.

Q. May 1956 you sold Lloyd's No. 1 for $70,000 and then in November 1956 you completed your sale——

A. In the meantime I had acquired No. 3.

Q. Let me finish my question here for a moment. In May of the same year you sold Lloyd's No. 2 for $40,000. Now tell me about the third store that you acquired. Where was it and when?

A. Tweedy Boulevard in South Gate.

Q. What was the name of the store?

A. I believe it was Mifflin.

Q. You changed the name of that one?

A. Yes, sir.

[fol. 1358] Q. What was the name?

A. Lloyd's.

Q. No. 3 you called it?

A. No 3.

Q. When did you buy that?

A. I believe it was January of '56, probably February.

Q. You owned and operated that store prior to selling either Lloyd's No. 1 or Lloyd's No. 2; correct?

A. Yes, sir.

Q. How long did you operate Lloyd's No. 3?

A. I sold it together with No. 1 in May of '56.

Q. Did you sell No. 3 and No. 1 to the same parties?

A. Yes, sir.

Q. What did you pay for No. 3?

A. $2,000.

Q. Plus inventory again; is that correct?

A. Yes, sir.

Q. What did you sell No. 3 for?

A. $25,000.

Q. Plus inventory. Now, following the sale of Lloyd No. 2 in November were you out of the grocery business at that point?

A. I immediately bought a market from King Cole in Burbank.

Q. Would that be in November '56?

[fol. 1359] A. Yes, sir, I believe so.

Q. Where is the King Cole Market located?

A. It was 2514 Magnolia Boulevard, Burbank.

Q. What did you pay for that market?

A. I believe it was $26,000, approximately.

Q. How long did you operate it?

A. I say two years. I think right to the day I believe it was two years.

Q. Did you sell it?

A. Yes, sir.

Q. For what price?

A. Sixteen.

Q. $16,000?

A. $16,000.

Q. In all these transactions, Mr. Taylor, this is the first capital loss that you have told me about; isn't that true?

A. Yes, sir.

Q. If my figures are right here it would take you through the year 1958.

A. Yes, sir.

Q. After selling King Cole what did you do?

A. In the meantime I had acquired Big Dollar No. 2.

Q. When did you acquire that?

A. I think around November '57.

[fol. 1360] Q. Is that the market we started to talk about as John's Market?

A. No, sir.

Q. Big Dollar No. 2, Inc. is the name of the corporation.

A. Yes, sir. It was formed to buy this particular market.

Q. You formed a corporation and took title as Big Dollar No. 2.

A. Right.

Q. Where was that market located?

A. 4460 Eagle Rock Boulevard, Los Angeles.

Q. Do you still have that store?

A. No, sir.

Q. When did you sell it?

A. 1958.

Q. *You* much did you pay for it?

A. $20,000.

Q. What did you sell it for?

A. Thirty-five.

Q. You operated it successfully for that period that you had it?

A. About half the time I think I took an operating loss in the last period.

Q. Who did you sell this to?

A. To a Merwyn Less.

Q. Is it in operation now?

A. Yes, sir.

Q. Is Mr. Lee operating it?

A. Yes, sir.

Q. After selling Big Dollar No. 2 what did you do?

A. Another vacation.

Q. You were out of the grocery business entirely at that point?

A. A month or two.

Q. When you sold Big Dollar No. 2 you just sold the store itself, you didn't convey your corporation, did you, the stock of the corporation?

A. Yes, I did. I did sell the corporation.

Q. You sold the stock in the corporation?

A. Yes, sir.

Q. Which carried with it the assets.

A. Yes, sir.

Q. How long were you gone on this vacation?

A. A month or so.

Q. Mr. Taylor, I may be a little confused here. When did you tell me that you formed Big Dollar Market No. 2, Inc.?

A. Back in 1957, I believe. I can clear up that confusion.

I think. I think I know what you are talking about. If we [fol. 1362] sold it how do we still have it?

Q. That's correct.

A. This one of the same name is a new corporation formed in 1961 to purchase or to operate the present location.

Q. The new corporation that you formed has the same name as the old corporation?

A. Yes, sir.

Q. Which is still in business?

A. No, sir. He abandoned the corporate name and incorporated under his own name.

Q. What is the basis for your statement that Mr. Lee abandoned the corporation? Did he dissolve the corporation?

A. Dissolved I guess is a better word.

Q. Now it begins to get a little clearer. When did you open the Big Dollar Market in Covina?

A. September of 1960. I had a lot of stores there to keep straight.

Q. Was this after you formed Big Dollar No. 2 in '61?

A. Yes, sir. No, not the second time. Did you say the second time?

Q. Yes.

A. No. Four months prior.

Q. You acquired the Covina store four months prior to forming Big Dollar No. 2?

A. Yes, sir.

[fol. 1363] Q. In 1961?

A. Yes, sir.

Q. Was Big Dollar, Covina, an individual operation?

A. Yes, sir.

Q. What did you pay for that store?

A. 10,000, no inventory.

Q. And again plus inventory?

A. There was no inventory at the time. It was closed.

Q. You stocked it?

A. Yes, sir.

Q. What did it cost you to stock it?

A. 37,000.

Q. Was it a complete market operation, including meat?

A. Yes.

Q. Liquor?
A. No liquor.
Q. Produce?
A. Produce.
Q. How long have you operated that store?
A. Until December of last year.
Q. 1962?
A. Yes, sir.
Q. Did you sell it?
A. Yes, sir.
[fol. 1364] Q. Who to?
A. William Sullivan and Leslie Richards.
Q. What was the sales price?
A. Fifteen thousand.
Q. Plus inventory?
A. Yes, sir.
Q. Substantially the same amount of inventory.
A. No, sir.
Q. More or less?
A. Half.
Q. Half?
A. Seventeen thousand.
Q. This store then represented another loss on the sale?
A. Yes, sir.
Q. What stores are you operating at the present time?
A. Just the store in El Monte.
Q. This is the one you had to repossess from Mr. Kuhn?
A. I didn't actually repossess it from Mr. Kuhn. He filed voluntary bankruptcy and I bought the free and clear fixtures from the creditors and assumed the contracts payable at some back payments.
Q. On the radius of a mile and a half which you described as your draw area from the John's Market what new stores have opened there since 1959?
[fol. 1365] A. Safeway and Food Giant.
Q. Safeway and Food Giant?
A. Yes, sir.
Q. Have there been any single store operations?
A. I don't believe so.
Q. What stores have been sold in that draw area since 1959?

A. The Key Fair Market sold once, I believe, and bankrupt once.

Q. Isn't it in operation today?

A. Yes, it is.

Q. Do you know of any stores that have closed up and gone out of business in that draw area?

A. There is one that I consider within that distance on Cogswell and San Bernardino Road which closed up.

Q. Do you know the name of the store?

A. The last name was Chuck Boys Market.

Q. How big a store was that?

A. About five or six thousand square feet.

Q. How long had he operated it, if you know?

A. I think the original owner closed it and had it better than 20 years, except for a period when he sublet it.

Q. It had been in operation for 20 years?

A. I believe so, yes, sir.

Q. All of the stores that are in that draw area you con- [fol. 1366] sider direct competition to John's Market, don't you?

A. Yes, sir.

Q. Beyond that area you do not consider the stores as direct competition; isn't that true?

A. Not to as large an extent as to those within the area.

Q. You don't consider any of the stores over in the San Fernando Valley competition with John's Market, do you?

A. No, sir.

Q. Long Beach?

A. No, sir.

Q. Santa Monica?

A. No, sir.

Q. Orange County?

A. No, sir.

Q. Downtown Los Angeles?

A. No, sir.

Q. With the exception of two stores that you described as having a capital loss—I will strike that question.

Could you tell us, Mr. Taylor, what your net worth was at the time that you bought that Santa Barbara store in 1946?

A. About $3,000.

Q. Since that time have you made money in any other business venture except the grocery business?

[fol. 1367] A. No, sir.

Q. What would you estimate your net worth to be today?

A. I don't know, sir.

Q. Mr. Taylor, we are not prying into personal financial facts of a man's life here unnecessarily. These are questions that we consider material and relevant to the question that the court is going to determine here. That is why we ask questions of that kind. And if you could give us an approximation I think it would assist the court when this evidence finally goes before him.

A. The reason I have no idea without having a statement prepared at this time, based on how much loss was taken in Covina, plus any operating losses that we may have had during the last year, and I don't have a final statement on that yet. I don't know if we are in or out of the black. Until the accountant gets all this thing put together. There were some inter-company accounts, transferring merchandise back and forth. I really don't know how it stands. Other than if you are referring to a personal basis, I have certain amounts of money that I am not even sure the total there that the corporation owes me in the form of loans. There again depending on what could be liquidated for what I consider the net worth. It could be very small or it could be very good, depending on what the store could be sold over again for a good price. In other words, I have the [fol. 1368] equity, but how much is the equity worth? Actually I don't know.

Q. It is fair to say, isn't it, that your net worth today is many times greater than it was in 1946 when you bought the Santa Barbara store?

A. Yes, sir.

Mr. Knight: Before you answer that, Mr. Taylor——

Mr. Bates: He has already answered it.

Mr. Knight: I move to strike the answer because the witness has already detailed the fact that he at this present time does not have a sound enough idea of his net worth to give us an accurate or even fairly accurate picture. Anything else would be surmise and conjecture on his part.

Mr. Bates: Q. Are you presently a member of Certified Grocers?

A. No, sir. I am a member of Orange Empire Cooperative.

Q. Have you been a member of Certified?

A. Yes, sir.

Q. During all the time that you have owned and operated stores you have been a member of either Certified or Orange Empire?

A. Except for the first two stores. The first one no membership and the second one in Spartan Grocers.

Q. At the present time you are a member only of Orange Empire?

[fol. 1369] A. Yes, sir.

Q. In Paragraph 6 of the statement, Mr. Taylor, you state in effect that chains such as Von's operate large warehouses, are serviced directly by railroad shippers at those warehouses and operate large trucking facilities and as a result they are able to buy in heavy volume direct from the producer and deliver the product to their own stores on their own trucks. And then you tell us that this gives chains such as Von's and Shopping Bag an advantage over independents and small chains in terms of inventory control.

What did you mean by that phrase, "inventory control"?

A. Well, for example when there is deal merchandise available and they are available to buy in large enough quantities to use this deal merchandise for a longer period than I am because of buying power. I can't take advantage of very many, or very few of these deals at all because I am not in a position to maintain these inventories. So I feel that there are many deals offered that the operator with the warehousing facilities can take advantage of and hold them to be sold as regular merchandise.

Q. What is the basis for your statement there are many deals offered? Have you been in direct touch with the producers?

A. I am referring in my case to deals offered by brokers [fol. 1370] primarily.

Q. Is this the only advantage that you refer to in this paragraph that the chain has over the independents by virtue of owning warehouses, trucks and buying direct?

A. Will you repeat the question?

Q. Is this the only advantage that the chain has over the

single store operator, the one that you have just related to us?

A. No, sir, I don't believe so.

Q. What other advantages—I would like to have you list them for me—that are attributable to their ownership of warehouses, truck facilities and so forth?

A. We are referring to warehouse facilities?

Q. Yes.

A. No. I had in mind other advantages other than warehousing.

Q. As a member of Certified you were a part owner of that concern, weren't you?

A. I think I had one share of stock, whatever the equivalent is.

Q. How about Orange Empire, do you own stock in Orange Empire?

A. Yes, I have a similar setup.

Q. Both Certified and Orange Empire own large warehouses, don't they?

[fol. 1371] A. Yes, sir.

Q. And they both own large fleets of trucks, don't they?

A. Yes, sir.

Q. Both of them bought directly from producers, didn't they?

A. Yes, sir.

Q. Were you not able to buy the groceries you put on your shelf as cheap from Certified and Orange Empire as a chain could buy it from a producer?

A. I can't answer that question. I do not know what the chains paid.

Q. As the owner of a single store operation you have complete charge of inventory control in that store, don't you?

A. Yes, sir.

Q. Then isn't it fair to say, Mr. Taylor, that a single store operator who is a member of either Certified or Orange Empire, or both, has the same advantages as a chain who own warehouses, trucks and so forth?

A. I don't believe so fully.

Q. Have you made any continuing study of the marketing conditions in Orange County and in Los Angeles County

or have you confined your study to the draw area in which you have operated your stores?

[fol. 1372] A. I wouldn't say that I made a study of it. I have some knowledge acquired from the publications.

Q. What publications have you studied or subscribed to?

A. Super Market News, which I have subscribed to. I don't know of any other one I have subscribed to. The only other one that I subscribed to formerly was The Chain Store Age. There are other magazines that come in the mail but I don't subscribe. They are called Progressive Grocer, Argus Bulletin, various others relating to frozen foods and such as that.

Q. Is the information which you read in the publications that you have just named the basis of your knowledge about marketing conditions in Orange County?

A. I would say mainly, yes.

Q. The same would be true of Los Angeles County?

A. Out of my immediate area, yes.

Q. You have never made any investigation, have you, or independent study concerning the market share of the grocery business that the single store operators in the aggregate have in the metropolitan area of Los Angeles?

A. Not personally.

Q. Do you know how many single store operators there are in the Los Angeles metropolitan area?

A. No, sir

[fol. 1373] Q. Do you know how many single store operators there are in Los Angeles County?

A. No, sir.

Q. Is it fair to say that you have not made any investigation or independent study of the market share that the grocery chains have either; isn't that true?

A. I have seen published figures but I have not made a study myself, no, sir.

Q. Have you ever seen any charts or graphs that purport to depict the market share of the different supermarket chains in the metropolitan area of Los Angeles?

A. Yes, sir.

Q. Isn't it true that the only charts and graphs that you have seen in that regard are those that were shown to you by the government attorneys who procured this statement from you?

A. Yes, sir.

Q. And aside from what those charts and graphs would show you have no other knowledge as to market share of any of the chains, have you?

A. No, sir.

Q. And you have no knowledge as to the market share of the single store operators and independents as a group, do you?

A. No, sir.

[fol. 1374] Q. Did you ever make any effort to get in a shopping center?

A. No, sir.

Q. In Paragraph 4, where you said you would testify that a single store operator cannot get into a more desirable shopping center, your statement is not based upon any personal experience that you have had in trying to get in, is it?

A. No, sir.

Q. What is the basis of that statement?

A. Conversation I had with two large single store operators, two different ones, namely Mr. Crawford in El Monte, in which he made a statement to me that he could not get into a major shopping center. And the other one I believe I attribute to Sam Spector, I believe, in the Valley.

Q. Then the basis of your opinion, as contained in that Paragraph 4, is what two people have said to you; that's correct, isn't it?

A. Other than this same fact being reported in these various publications periodically. It was mentioned quite frequently in the various nationwide publications.

Q. I think you stated a little while ago, Mr. Taylor, that there have been two supermarkets that moved into the draw area of John's Market.

A. Yes, sir.

[fol. 1375] Q. Has that been recently?

A. 1959.

Q. Both of them came in in 1959?

A. Yes, sir.

Q. What effect did that have on your business?

A. Well, let's see. I believe Safeway opened first, about one week's difference either way, with Food Giant. Between them they got me for five thousand a week.

Q. Your volume?

A. My volume dropped at that time, I should say.

Q. It decreased five thousand a week?

A. Yes, sir.

Q. What happened when the other store moved in?

A. Well, that is the only two that moved in.

Q. It was the two together that caused the decrease?

A. Yes. They were opened one week apart, if I recall correctly, on approximately July 1st and July 8th, 1959.

Q. Competition increased considerably then when they moved in, didn't it?

A. Yes, sir.

Q. Has it increased since? Let me strike that question. I didn't finish it but I would like to strike it.

Are there any Von's or Shopping Bag Stores that you consider in competition to John's Market?

A. Yes, sir.

[fol. 1376] Q. Which one?

A. The one on Valley Boulevard in downtown El Monte.

Q. How far is that from John's Market?

A. Half a mile.

Q. When did that store open?

A. I do not know, sir.

Q. It was open when you purchased John's Market?

A. Yes, sir.

Q. In Paragraph 14 you state——

A. Excuse me, I didn't complete the answer, I guess.

Q. Excuse me.

A. There is a second Von's-Shopping Bag within this area on the corner of Lower Azusa and Peck Road.

Q. And that store was there when you purchased John's Market?

A. Yes, sir.

Q. Are you finished now?

A. Yes, sir.

Q. In Paragraph 14 of your statement you say in effect that this merger that Von's has just effected with Shopping Bag will accentuate the larger chains' advantages. Will you please specify for me what advantages the larger chains are going to have which are attributable to this merger?

A. I believe through the consolidation of facilities, ware-[fol. 1377] houses, offices, as well as advertising and numer-

ous things of that nature, that they are able to operate at a lower overhead and therefore bring about lower price structure and therefore making our gross profit smaller if we choose to meet them. And our overhead is not being decreased and therefore our margin of profit has been.

Q. As a businessman you have attempted to reduce your cost wherever it was possible, haven't you?

A. Yes, sir.

Q. And as a businessman you have attempted to increase the volume or sales wherever it is possible?

A. Yes, sir.

Q. You have tried to save money on advertising from time to time, haven't you?

A. Yes, sir.

Q. And you have tried to save money on any type of overhead that you could do without and still operate your business, haven't you?

A. Yes, sir.

Q. Don't you, as a single store operator, then do the same thing that you say gives an advantage to the chain?

Mr. Knight: Is the question clear to you, sir?

The Witness: I think it needs an explanation.

Mr. Knight: I am sorry, it isn't clear to me. If you wouldn't mind rephrasing it, please.

[fol. 1378] Mr. Bates: I am asking Mr. Taylor the question.

Q. Do you understand the question, Mr. Taylor?

A. Not entirely, no, sir.

Q. Let me put it this way: You state that Von's-Shopping Bag is going to have an advantage over the independent operators in effect because they are going to be able to save money, some cost of operation by the merger; is that correct?

A. Yes, sir.

Q. Doesn't a single store operator have the same advantage whenever he can reduce his cost of operation?

A. No, sir.

Q. Why doesn't he?

A. Because as a single store operator, you take the item of advertising for example. One advertisement in the area newspaper, in our case in particular, covers two Von's-Shopping Bags and only covers one John's Market. There-

fore I have only half the advantage within my own area.

Q. There was one period when you were operating three Lloyd's Stores. How about that, didn't you advertise for those three stores at the same price?

A. Yes, sir. I had an advantage at that time.

Q. Then it is fair to say that what you mean by that phrase "advantage" is an opportunity the chain has to reduce their cost of operation; is that right?

[fol. 1379] A. Yes.

Q. Mr. Taylor, the dictionary defines the word "monopoly" as being the exclusive privilege of selling some commodity in a particular area. You use that word "monopoly" in Paragraph 14 of the statement. Do you accept that definition?

Mr. Knight: Mr. Taylor, before you answer that, sir, I am going to object to it.

I am going to object to the question on the ground that this is not a monopoly case, this is not a Sherman Act case. This is a Clayton Act case. The definition of "monopoly" in and of itself, the word used alone, is entirely irrelevant and immaterial. The phrase that the Clayton Act uses is "the substantial lessening of competition or tendency to create a monopoly."

Now you may answer, sir, if you recall.

Mr. Vaughn: Would you be willing to strike the word "monopoly" from all these witnesses' statements if it is so irrelevant?

Mr. Knight: If you recall the question, Mr. Taylor. I have objected to it but you may answer.

Mr. Bates: Read my question, Mr. Reporter.

(The reporter read the pending question.)

The Witness: Do I accept the dictionary definition of "monopoly," is the question?

[fol. 1380] Mr. Bates: Q. Yes.

A. Yes.

Q. And you used it in that sense in expressing the opinion in Paragraph 14?

A. I use it as stated here, substantially lessening competition and tending to create a monopoly.

Mr. Bates: Will you read that, Mr. Reporter.

(The reporter read the answer as requested.)

Mr. Bates: That is all, Mr. Taylor.

(A short recess was taken.)

Cross-examination.

By Mr. Knight:

Q. Mr. Taylor, could you give us, please, for the record, the total number of years you have been in the retail grocery business in the Los Angeles metropolitan area in one capacity or another, be it boxboy, sales clerk, manager, or what have you?

A. About 15 years.

Q. Mr. Taylor, you recall mentioning the store at 93rd and Avalon that you at one time owned?

A. Yes.

Q. As best you can recall what would you consider the draw area of that particular store to be?

A. About six or seven blocks.

Q. Did you have the benefit of any so-called transient [fol. 1381] trade while you were in that store?

Mr. Vaughn: I object to the question as being uncertain. I have no idea what you mean by "transient trade."

Mr. Knight: Q. Mr. Taylor, do you understand what I mean by "transient trade," people driving by and stopping?

A. The question was——

Q. Did you have the benefit of any transient trade?

A. Did I have the benefit of any? I would say "Yes."

Q. Approximately what percentage of your business would you say was transient in that particular neighborhood?

A. I have no idea, sir.

Q. In that particular neighborhood, referring now to 93rd and Avalon, what was the closest chain operated supermarket nearest you, if you recall?

A. Safeway Store, I believe.

Q. About how far from 93rd and Avalon was that, sir?

A. I don't recall their exact locations. There were three or four surrounding this area.

Q. There were three or four Safeway Stores surrounding the area?

A. Yes, sir.

Q. Did that fact have anything to do with your selling the store?

A. No, sir.

Q. This store, the Key Fair Market which you mentioned [fol. 1382] in your testimony with Mr. Bates, I believe you testified that that had been under two or three ownerships and that store at one time was closed. Do you know why it was closed?

A. Through involuntary bankruptcy, I believe it was called, action of the creditors.

Q. How far was that store from you?

A. That is less than a mile I would say. Seven, eight blocks, something like that in distance.

Q. This Lloyd's Market No. 1, sir, what did you consider the draw area of that particular store to be?

A. I would say about a mile and a half, sir.

Q. How many chain operated supermarkets were there within that mile and a half area?

A. Safeway, Better Foods was a chain—What constitutes a chain?

Q. A chain, when I use the word, includes an operation of two or more stores under one ownership, sir.

A. Safeway, Better Foods, Raisin's, Shopping Basket, Thriftimart, or Robert's I believe it was called at that time, and Hiram's. That's all that I recall, sir.

Q. Lloyd's No. 2, which at one time was known as Foodville, just so we are talking of the same store, what did you consider the draw area of that store to be?

A. About the same.

Q. The same as Lloyd's No. 1?

[fol. 1383] A. Yes, sir.

Q. Within that draw area how many chain operated supermarkets were there?

A. Safeway, Von's, McDaniel's. That's all I recall in the immediate area.

Q. As to Lloyd's No. 3, which you have named as Mifflin, what was the draw area of that store, or what you considered to be the draw area?

A. This store was within seven blocks of the No. 1 store

and therefore roughly in the same area, faced with the same competition, except that I had one more competitor within the radius this time, which would be the Food Giant immediately south of us.

Q. Did the fact that several chains were operated within the draw area of at least two of these Lloyd's Markets, was the fact of their existence a factor in your decision to sell those two stores? Have I made my question clear?

A. No, sir, it was not a factor.

Q. This King Cole Store, you testified you purchased that store for roughly $26,000.

A. Yes, sir.

Q. And you sold it for $16,000?

A. Yes, sir.

Q. What was the draw area for that store?

[fol. 1384] A. About one mile.

Q. No transient trade involved there at all?

A. Could be some. It's on a traveled street.

Q. You sold that store for approximately $16,000; is that true?

A. Yes, sir.

Q. That is less than you paid for it?

A. Yes, sir.

Q. Can you tell us what happened during your operation of the store to decline in value approximately $10,000?

A. I lost $35,000, operational loss. I considered that time to get out.

Q. When you say "operational loss," would you break that down a bit for us?

A. That is other than the loss that I had on the fixtures at the time of sale. In other words, during the period of operation, in other words, the overhead having exceeded gross profits therefore causes what we call an operational loss.

Q. What chain stores operated by the leading supermarket chains were within the draw area of that King Cole Store?

A. Another King Cole, Thriftimart, Metric's, Safeway. I believe that's all at that time.

Q. You have told us, sir, that at one time you were a [fol. 1385] member of Certified Grocers. At that time what store or stores were you operating?

A. I operated the three Lloyd's markets as a member of Certified, then the two Big Dollar Markets, that is Burbank and Eagle Rock, as a member of Certified, then operated the El Monte store originally as a member of Certified, the Covina store as a member of Certified, and for 11 months the second El Monte store I was a member of Certified.

Q. What stores did you operate, sir, while you were a member of Spartan Grocers?

A. 93rd and Avalon.

Q. Any of the others while you were a member of Spartan?

A. I had a dual membership with Spartan and Certified for a short period in El Monte originally.

Q. Do you know whether Certified took over Spartan fairly recently?

A. Yes. Prior to the time that I am referring to there.

Q. At the time you were a Spartan member did they deliver groceries to you?

A. Yes, sir.

Q. Mr. Taylor, you are presently a member of Orange Empire; is that true?

A. Yes, sir.

[fol. 1386] Q. What was the reason, if any, for your terminating your Certified membership and becoming a member of Orange Empire?

A. To withdraw capital that was deposited with Certified in the form of deposits.

Q. How much money did you have on deposit with Certified, Mr. Taylor?

A. Something over $15,000.

Q. When you were a member of Spartan how much did you have on deposit with them?

A. My deposit was with Certified, sir. Spartan was a subsidiary and therefore I had no actual deposit with Spartan as such.

Q. But you were being served by Spartan trucks?

A. Yes, sir.

Q. At that time what was the amount of your deposit, at the time you were being served by Spartan?

A. I don't recall, sir. There have been varying amounts, sir. I made withdrawals.

Q. How much money do you have on deposit, if any, with Orange Empire?

A. I have a base deposit of $1240. This includes membership fees and what not. I believe it is actually a thousand dollars plus $240 in stock and membership fees, and I contributed $25 weekly to the bank. So I have been a member [fol. 1387] since December and I have $100 a month—another $500 or so. Perhaps now I have about $1700 on deposit.

Q. Did you ever purchase groceries through Smart & Final?

A. No, sir. Other than one or two small purchases at a Cash & Carry unit at some time or another.

Q. Do they have Cash & Carry units fairly near your store in El Monte?

A. Yes, sir.

Q. About how many blocks away?

A. I would say it's about a mile and a half, sir.

Q. So you run specials in your store on weekends, Mr. Taylor?

A. Yes, sir.

Q. Would you name for me a typical special on any weekend that might occur to you?

A. A typical special? Well, like Wesson Oil is very typical, frequently run.

Q. Wesson Oil?

A. Yes, sir.

Q. Do you run mayonnaise on special?

A. Occasionally.

Q. Do you run coffee?

A. Yes, sir.

Q. How far in advance do you plan these specials? [fol. 1388] A. About four days.

Q. Do you advertise the specials in El Monte where you are now?

A. Yes, sir.

Q. How do you advertise them?

A. By direct mail.

Q. So-called mailers out to your draw area; is that true?

A. Right.

Q. Since you have been in your El Monte location, sir, have you had specials each weekend, or every other week-

end, or approximately how often do you have specials, sir?

A. For the most part every week.

Q. And the commodity or item varies week to week; is that true?

A. Yes, sir.

Q. And on every occasion you order this particular special approximately four days ahead of the weekend upon which the item is due to be on sale; is that true?

A. Yes, sir.

Q. When you were a member of Spartan and your stores at that time were being served by Spartan, did you likewise run specials?

A. Yes, sir.

[fol. 1389] Q. Would your answer be the same for Certified?

A. Sir?

Q. Would your answer be the same for the period while you were a member of Certified and while your stores at that time were being served by Certified?

A. I didn't understand the word——

Q. Did you run specials, sir in stores which you owned while you were being served by Certified?

A. Yes.

Q. Now I am going to ask you, Mr. Taylor, to think of all of your stores which you have had at various times. On every occasion that you ran a special, be it as a member of Spartan, Certified or Orange Empire, were you in every case on every weekend able to obtain enough of the particular commodity which you were running special?

A. No, sir.

Q. Mr. Taylor, Mr. Bates during his examination mentioned warehousing. In response to his questions you suggested that at various times brokers are able to offer deals which a chain grocer, having a warehouse, is able to take advantage of. Is that true?

A. Yes, sir.

Q. Could you tell us more about those deals, how they operate and so on?

A. Well, for example, take the Lewis Food Company, [fol. 1390] which distributes Dr. Ross and Skippy Dog Food. Approximately twice a year they have an allowance that

they allow the trade to purchase merchandise at a given figure off per case. As far as I know there is no limit on this merchandise as to how much you may purchase and store and thereby take advantage of it.

Q. Have you finished your answer, sir?

A. Yes, sir.

Q. Is there a minimum quantity that one must buy in a situation such as this?

A. Generally.

Q. Would that minimum quantity be larger than you were able to store at any of your stores?

A. Physically or financially?

Q. Physically, sir. Let us limit it right now to physically.

A. Yes, I would say so.

Q. We have covered the physical aspects. What about financially, were you able to make such purchases?

A. No, sir, very few.

Q. Concerning these shopping centers, Mr. Taylor, when Mr. Bates used that expression "shopping center," what is its connotation or its meaning to you, sir, "a shopping center"? Would you define one for us, please?

A. I would define that as a group of stores served by [fol. 1391] a common parking lot, that contains such major stores as Thrifty Drug Stores, perhaps major chain grocery, and various other types of businesses that are all located together, with more common drawing power I would say.

Q. Would you say there would be a hardware store in one of those?

A. Perhaps so.

Q. Perhaps a shoe repair store, perhaps a dry cleaning shop?

A. Yes, sir.

Q. Perhaps a ladies dress shop?

A. Yes, sir.

Q. Throughout your experience in the grocery business, your 15 years, based upon the answers to questions which Mr. Bates propounded to you you have owned grocery stores in various parts of the Los Angeles metropolitan area; isn't that true?

A. Yes, sir.

Q. And during that time you have observed the shopping

centers in these various areas in which you have operated grocery stores?

A. During the last most recent years primarily.

Q. Mr. Taylor, based upon that observation have you ever seen a grocery store in one of those shopping centers which was not a grocery store belonging to the first 12 [fol. 1392] grocery chains?

Mr. Bates: I object to that as being confusing, ambiguous, no foundation laid and no identification as to who the 12 leading chains are.

Mr. Knight: Q. You may answer, Mr. Taylor.

A. The question was have I observed a shopping center with an independent, meaning one store only?

Q. I will rephrase the question.

What grocery stores have you observed in the shopping centers which have come under your observation?

A. Which grocery stores?

Q. Yes, sir.

A. Food Giant, Thriftimart, Alexander's, Von's. I have seen others. Are we referring to my competitive area?

Q. No, sir.

A. Just shopping centers I have observed?

Q. Yes, sir.

A. Mayfair, Ralphs.

Q. Have you finished?

A. I believe so, yes, sir.

Q. If you need time to think of others, you may have it.

A. I can probably recall others.

Q. But as of now that is your answer to the question?

A. Yes, sir.

[fol. 1393] Q. You have testified, Mr. Taylor, that since the opening of the Food Giant near your El Monte store and the Safeway that you have lost as much as $5,000 per week in the operation of your store; is that correct?

A. Yes. The volume I am referring to.

Q. How much longer do you think this can go on?

A. (No audible response.)

Q. We need an answer for the record.

A. It is problematical with me.

Q. Mr. Taylor, where is Lower Azusa Road and Peck Road in relation to your store? How far is it?

A. Distance?

Q. Yes, sir.

A. I believe it is one mile, almost exactly.

Q. Mr. Taylor, we have gone into advertising here and I would like to ask you whether you advertise in the Los Angeles Times, sir?

A. No, sir.

Q. Did you advertise in the now defunct Los Angeles Mirror, sir?

A. No, sir.

Q. Do you advertise in the Los Angeles Herald Express, sir?

A. No, sir.

Q. Do you know whether Von's and Shopping Bag adver- [fol. 1394] tise in the Los Angeles Times?

A. Yes, sir.

Q. Do you know whether Von's and Shopping Bag advertised in the now defunct Los Angeles Mirror?

A. I believe they did.

Q. Do you know whether Von's and Shopping Bag advertised in the Herald Express?

A. No, sir.

Q. Approximately how many times a week, if you know, Mr. Taylor, does Von's-Shopping Bag advertise in the Los Angeles Times?

A. Two.

Mr. Knight: ~~I have no~~ further questions.

Redirect examination.

By Mr. Vaughn:

Q. Now it is my turn, Mr. Taylor. I hope I don't take too long. You said you talked with Mr. Crawford about the shopping center problem. Is that Mr. W. H. Crawford?

A. No, sir.

Q. Is that his son?

A. His son.

Q. He operates a store in El Monte, doesn't he, at Five Points?

A. Yes, sir.

Q. It is called Crawford's Modern Village Store?

[fol. 1395] A. Yes, sir.

Q. Does either Mr. Ray Crawford or his father operate any other stores in the Los Angeles metropolitan area?

A. Any other stores?

Q. Grocery stores.

A. That is the only grocery store I know of.

Q. They have a junior department store elsewhere do they not?

A. Yes, sir.

Q. That is a very successful market operation, is it not?

A. It appears to be.

Q. Did you ever talk with Mr. W. H. Crawford about the grocery business?

A. Yes, sir.

Q. Have you ever heard him say, "It is not a question of whether I can compete with the chains but whether the chains can compete with me"?

A. No, sir.

Q. Are you a member of the Southern California Retail Grocers Association?

A. No, sir.

Q. I take it, then, you are not a member of NARGUS?

A. I don't know what you mean by a member. I believe this is construed as membership when you are a mem-
[fol. 1396] ber of the NARGUS member cooperative.

Q. No. I am talking about the National Association of Retail Grocers of the United States.

A. No.

Q. You are not?

A. I don't think so.

Q. Did you know that Mr. Crawford was at one time president of that organization?

A. Yes, sir.

Q. Prior to March 1960 were smaller concerns without Triple A financial ratings able to get into shopping centers?

A. I don't know the ratings that some had. There were some smaller chains in shopping centers. However, I do not know whether they were Triple A or what.

Q. Such as?

A. Well, I think Alexander's is one that I consider a small chain.

Q. Hughes Markets has some stores in shopping centers, has it not?

A. I believe they do have some, yes.

Q. Do you know how many stores Hughes has, or how many stores in the Hughes chain?

A. Maybe 10 or 11, something like that.

Q. That was a chain that was started with one store sometime around 1952; isn't that correct?

[fol. 1397] A. Under the Hughes name, yes.

Q. Prior to that time do you know what Mr. Hughes was doing?

A. Yes, sir.

Q. What was he doing?

A. Part of the Thriftimart organization.

Q. About 1952, just before he opened his first market under the name of Hughes Markets, what was he doing?

A. I don't know, sir.

Q. Do you know whether or not he was working for Thriftimart?

A. No, sir.

Q. What were some of the other small chains that have stores in shopping centers? Let me suggest the name Shoppers Market. Have you ever seen the name Shoppers Market in a shopping center?

A. Yes, sir.

Q. How many stores does Shoppers have?

A. I am not sure, sir. I would estimate ten.

Q. That was a chain that opened its second store sometime after 1950; isn't that right?

A. Sometime after?

Q. Yes. Opened its second store sometime after 1950.

A. I don't believe so. I think it was much earlier than that.

[fol. 1398] Q. Let me ask you this. Just prior to March 1960, which by the way is the month in which Von's and Shopping Bag merged, smaller concerns, that is concerns with one or two stores, were, generally speaking, not able to get into the better shopping centers; isn't that right?

A. Yes, sir.

Q. And the same is true today; is that not so?

A. Generally speaking, yes, sir.

Q. In your opinion has the merger of Von's and Shopping

Bag had any effect on the ability of smaller concerns to get into shopping centers?

A. No, sir.

Q. Prior to the merger Von's had a warehouse, did it not?

A. Did Von's have a warehouse?

Q. Yes. Did it?

A. I don't know, sir.

Q. Do you know whether Shopping Bag had a warehouse prior to the merger?

A. Yes, sir.

Q. What effect did the merger have on the ability of Von's and Shopping Bag to buy direct, if you know?

A. I don't know there was any difference as to the availability to buy.

Q. Did Von's advertise in the metropolitan newspapers [fol. 1399] prior to the merger, that is prior to March 1960?

A. Yes, sir.

Q. Did Shopping Bag?

A. I can't be certain as to the dates but I do recall it seems that some years back that they did not advertise regularly.

Q. Prior to March 1960 you saw Shopping Bag ads in the Los Angeles Times, did you not?

A. I believe so.

Q. You have seen ads that said just "Shopping Bag," not "Von's-Shopping Bag"; haven't you?

A. Yes.

Q. What effect did the merger of Von's and Shopping Bag have on the ability of larger chains to advertise in metropolitan newspapers?

A. Other large chains?

Q. Just any large chains. What effect did the merger have on the ability of larger chains to advertise in metropolitan newspapers?

A. Well, in the Von's-Shopping Bag case specifically, I would say that since they are reportedly doing approximately the same volume that it would tend to have a tendency to cut their advertising overhead considerably, possibly as much as 50 per cent.

Q. In other words, they saved some money?

[fol. 1400] A. I would think so.

Q. But Von's advertised in the metropolitan newspaper prior to the merger, did it not?

A. Yes, sir.

Q. And it advertises in metropolitan newspapers now, doesn't it?

A. Yes, sir.

Q. Do you think that the competitive advantage that they now have is any different than before the merger?

A. Only through the cost of the advertising.

Q. But it is no more effective weapon now competitively than it was before, is it?

A. I would say from my own experience that probably it is more effective.

Q. You tell me why that is.

A. Because when I was operating Lloyd's 1 and subsequently Lloyd's 2 and then 3, as I acquired these and added the additional name and location to my ad, business increased in 1, 2 and 3, in that order. Because of the effect of a larger organization, and I recall some of the opening ads around the time of the merger that pointed out this combined advertising as one of the things that they had to offer, I believe.

Q. Let us talk about the three Lloyd's that you operated. [fol. 1401] A. Yes, sir.

Q. The most number of stores you have operated at any one time is three; is that right?

A. That's right.

Q. And they were all called Lloyd's?

A. Yes, sir.

Q. And you sold them off one at a time; is that correct?

A. I actually contracted to sell them all at once to the same people.

Q. Who was the purchaser, the contemplated purchaser in that?

A. Two individuals, I believe, formed a partnership. Their names were Howard Sheldon and Louis Angel.

Q. And you did ultimately sell two of them at once; is that right?

A. I gave posession of two at once with a six months' option on the third, or the No. 2 store.

Q. To these same people?

A. Which was exercised at the end of the six months.

Q. I beg your pardon?

A. They exercised the option at the end of the six-month period. So that they acquired the No. 2 store later than the other two.

Q. So you ultimately sold them all to the same partner-[fol. 1402] ship?

A. Yes.

Q. Why didn't you continue to build a chain of your own if you felt that these chains had advantages?

A. I really never had any inspiration to be a chain operator as such, I don't think.

Q. You just intended to operate one or two stores; is that right?

A. Yes.

Q. And there are a lot of people like that in the grocery business, are there not?

A. I imagine so.

Q. Let us go back. You opened your first Lloyd's in what year?

A. '53.

Q. And your second Lloyd's in what year?

A. I think it was '54, I believe.

Q. And your third Lloyd's in what year?

A. '56.

Q. Was your business operating successfully at the time you sold it?

A. Yes, sir.

Q. You have had great success in finding locations at which to operate grocery stores, have you not?

A. I don't think I would put it that way.

[fol. 1403] Q. Is there any doubt in your mind that you could have expanded your business under the Lloyd's name and added more stores as time went on?

A. Could have been a possibility.

Q. Something you really didn't want to do, I take it?

A. That's right.

Q. There are other men who have wanted to do that, to expand businesses and build chains, such as Joe Hughes; isn't that right?

A. Yes, sir.

Q. Do you know a man named Ted Wood?

A. Yes, sir.

Q. He started about the same time you did, didn't he, with Pantry Food Markets?

A. No, sir.

Q. He started at about the same time as you started Lloyd's?

A. Not quite that early, no, sir.

Q. He left Alpha Beta in about 1954 and along with some other people opened up.

A. I didn't know him at that time, sir.

Q. But you do know that he started a chain and started with a single store sometime in about 1954 or thereabouts and has now built it up into a ten-store chain; isn't that right?

[fol. 1404] A. You use the term "he". I believe this was a group of people who started this and bought this original store.

Q. And Ted Wood is the president?

A. President of the company, right.

Q. Ted Wood and the people that started this business all came from Alpha Beta, did they not? They were former employees of Alpha Beta?

A. I believe so.

Q. And there was another former employee of Alpha Beta named Joe Goodnight. Do you know him?

A. I know of him, sir.

Q. He started a chain of markets called Michael's Markets in Orange County with one store in about 1958; isn't that so?

A. I believe so.

Q. Do you know how many stores he has today?

A. I believe he has five.

Q. Do you know Paul Palmer?

A. Yes, sir.

Q. Sometime in the late 1950's he started a chain which is now known as Country Cousins; isn't that right?

A. Yes, sir.

Q. Do you know how many stores he has?

A. Perhaps five.

Q. And there are others whom you and I could name [fol. 1405] who have similar histories; isn't that so?

A. Yes, sir.

Q. Mr. Knight asked you about your store at 93rd and

Avalon and you said it was surrounded by four Safeways.

A. Three or four I believe. Smaller types.

Q. The smaller type Safeway Stores?

A. Yes, sir.

Q. At that time do you know how many stores Safeway had in the Los Angeles metropolitan area?

A. I recall a figure of zonewise, including San Diego and Santa Barbara and so forth, I believe something between four and five hundred.

Q. Do you know how many of those were in Los Angeles and Orange Counties?

A. No, sir.

Q. I take it Safeway was your principal competition at 93rd and Avalon.

A. No, sir.

Q. What was your principal competition?

A. I don't recall the name of the store, sir.

Q. Was it an independent market?

A. It was an independent, yes.

Q. I take it both of you were doing well against Safeway competition.

A. I didn't say Safeway was in my draw area, if you [fol. 1406] recall. I said they were surrounding my draw area.

Q. I am sorry, I misunderstood you then.

A. I was asked to name the chains in this area that were surrounding and I specified surrounding areas.

Q. You feel then that neither the independent, who was your principal competition, nor yourself at 93rd and Avalon was in competition with the Safeway Stores; is that right?

A. I feel that the independent was, yes, sir.

Q. You don't remember the name of the independent?

A. No, sir.

Q. Did he have a larger store than yours?

A. Yes, sir, quite a bit larger.

Q. Is that Paul Kodimer?

A. No, sir. He was outside my area, but quite a competitor I would say for everyone.

Q. Do you know how many Safeway Stores there are in the zone that you speak of that is Southern California?

A. No, sir, I do not.

Q. Do you know that there are far less than 400?

A. Yes, sir.

Q. They have closed a number of very small stores?

A. Yes, sir.

Q. And opened up larger stores?

A. Yes, sir.

Q. And the total number of stores has declined?

[fol. 1407] A. Yes, sir, I think so.

Q. I take it Mr. Knight was asking you about the chain competition or the chain stores in or about each of your stores. I take it that there were also independents who had stores in and about the various stores that you have owned and operated; is that not right?

A. Yes, sir.

Q. Did these independents provide vigorous competition?

A. Not in too many instances, no, sir, I don't think so.

Q. There are certain independents that do. Let us get back to Paul Kodimer. He runs one or two stores now, doesn't he?

A. Yes, sir.

Q. Under the name ABC Stores?

A. Yes, sir.

Q. Would you characterize him as a tough competitor?

A. A tough competitor?

Q. Vigorous competitor.

A. Aggressive.

Q. And apparently a successful one, isn't that so?

A. Apparently so.

Q. Now let us talk for a moment, if we can, about your King Cole Market that you took over in Burbank where you lost money. Would you tell me what factors you [fol. 1408] attribute your operational losses to in that store?

A. Very vigorous competition from large stores.

Q. You have mentioned that there was a Thriftimart there. Was that one of those large stores?

A. Yes, sir.

Q. A Metric's?

A. Metric's.

Q. Is that M-e-t-r-i-c?

A. M-e-t-r-i-c-k, I think.

Q. How many stores did they have at the time?

A. I believe they had 10 or 11 total.

Q. And Safeway, did they have a large store in Burbank?

A. Yes, sir.

Q. Any other stores who are competitors of yours in Burbank?

A. Yes, sir.

Q. Would you tell me who they are?

A. King Cole.

Q. In other words, there were two King Coles in Burbank, you bought one and they retained one; is that right?

A. I got the bad one.

Q. Any others?

A. Are we referring specifically to my approximate draw area, that I would consider my effective draw area?

[fol. 1409] Q. Yes, sir. The stores that you felt were trying to attract the same customers as you were trying to attract.

A. There are others that would be outside of this radius, however. But their drawing area, in my opinion, was larger and therefore they would encompass me. Food Giant, Toluca Lake, which was not too far away, perhaps a mile and a half. Ralphs, Bill's Ranch Market. Particularly Bill's Ranch Market.

Q. What has happened to that Toluca Lake Food Giant, do you know?

A. What has happened to it?

Q. Yes.

A. I don't know what has happened to it.

Q. When you speak of Ralphs, are you speaking of the Ralphs on San Fernando Road?

A. In downtown Burbank, yes, sir.

Q. Do you know what has happened to that store?

A. No, sir.

Q. Do you know whether or not it is closed?

A. No, sir.

Q. You mentioned Bill's Ranch Market. That was operated by whom, do you know?

A. Someone named Frederick.

Q. And someone named Gilbert; is that right?

A. And Gilbert, yes, sir.

[fol. 1410] Q. Was that store already in operation when you acquired the Burbank store?

A. Yes, sir.

Q. Did you ever go to that store?

A. Yes, sir.

Q. Did it appear to be successfully operated?

A. Yes, sir.

Q. Wouldn't you say that was the most vigorous competition that you faced in Burbank was from Bill's Ranch Market?

A. Doggone good competitor. One of the most vigorous.

Q. Do you know how many stores Mr. Frederick and Mr. Gilbert owned at that time?

A. I don't know the actual ownership but I believe they were in some way connected with the Hollywood Ranch Market.

Q. Do you know whether they have opened up other stores since that time?

A. The same thing, there are two other stores.

Q. Jack's Ranch Market in Culver City?

A. Jack's Ranch Market and Ted's Ranch Market.

Q. On Hobart in Los Angeles, isn't that right, near Santa Monica Boulevard?

A. Santa Monica Boulevard, somewhere in there.

Q. Have you ever been in those stores?

[fol. 1411] A. Yes, sir.

Q. The same thing could be said about them as Bill's Ranch Market; isn't that correct?

A. I don't think—Santa Monica Boulevard or Ted's Ranch Market I don't think appeared to me to be as much of a contender as the others.

Q. How long has that store been open, sir?

A. Ted's Ranch Market?

Q. Yes.

A. Since the demise of the Yor-Way Markets.

Q. Since it a fact that it is open a month?

A. Not the one I am referring to.

Q. It is a former Yor-Way but has been in stages of remodeling for some time and has just opened in the last month; isn't that right?

A. I don't have that knowledge. It was operating some time back when I happened to be in that area.

Q. I could be misinformed.

A. I believe quite some time ago.

Q. Do you know the Crower's Market in Temple City at the corner of Lower Azusa Road and Temple City Boulevard?

A. Crower's Market?

Q. Yes, Crower's Market. Do you know that store?

A. Yes, sir.

Q. Do you regard that as a competitor of yours?

[fol. 1412] A. No, sir.

Q. For what reason?

A. Distance primarily.

Q. Did you know it when it was the Star Market?

A. Yes, sir.

Q. Were you in it when it was a Star Market?

A. No, sir.

Q. Have you been in it since it has been a Crower's Market?

A. Yes, sir.

Q. Do they appear to be operating that store successfully, the present owners of it?

A. I have no knowledge of it.

Q. You don't know?

A. I really don't.

Q. Did you notice their meat department?

A. Yes, sir.

Q. Was that what you would regard as a first class service meat department?

A. It's a self-service meat department.

Q. Is it first class?

A. Not in my opinion.

Q. You say when the Safeway and Food Giant opened near you that your gross sales went down $5,000 a what?

A. A week.

[fol. 1413] Q. Was that immediately after their opening?

A. Immediately.

Q. Has any of that volume been recaptured by you?

A. You say, "has." It was. There was some recaptured. I shouldn't say "recaptured," because I don't know where my volume came from. I did have an increase.

Q. Your volume went down $5,000 a week immediately after they opened?

A. Yes, sir.

Q. And then it started back up again to the level where it had previously been?

A. Yes, sir.

Q. Did it reach the level it had previously been?

A. Yes, sir.

Q. Since that time has it tailed off again or have you been able to maintain that volume?

A. It has now gone down.

Q. How much.

A. From its peak 50 per cent.

Q. Fifty per cent of your total weekly sales?

A. Yes, sir.

Q. It went down $5,000 a week. What precentage of that represented your total sales immediately after the Food Giant and Safeway opened?

A. About 30.

[fol. 1414] Q. Then it went back to where it was and it went back down to 50 per cent off of its high; is that correct?

A. Yes, sir.

Q. When was the peak?

A. Sir?

Q. When did the Safeway and Food Giant open up?

A. July 1959.

Q. When did your sales volume return to its prior level after that?

A. December '59.

Q. Then after December '59 did you maintain that sales volume for a while?

A. Had a gain.

Q. You had a gain?

A. Yes, sir.

Q. To what level?

A. $21,000 plus average per week.

Q. What was the volume you had before Food Giant and Safeway opened?

A. $17,000.

Q. It went on up to $21,000, you say?

A. Yes, sir.

Q. When was that?

A. It reached it in March of 1960.

Q. And then it started to go down?

[fol. 1415] A. No, sir.

Q. It leveled off?

A. Yes, sir.

Q. And it stayed leveled off until when?

A. October of the same year.

Q. Then it started to go down?

A. Yes, sir.

Q. What is your opinion of the reason why it has gone down since October?

A. I would say that some of my competition got some added strength.

Q. Are you talking about Safeway and Food Giant?

A. Safeway, Food Giant and Shopping Bag and Von's. I think they have all increased.

Q. What is your sales volume per week now?

A. In excess of $10,000.

Q. Is it holding pretty steady at that level now or is it still declining?

A. It is fairly steady.

Q. I take it that you would say that competition has increased in your particular area in the last three years; is that so?

A. Yes, sir.

Q. We have run now from 1959 to 1963. What was the period of time when Mr. Kuhn was operating that store?

[fol. 1416] A. I believe the period was for about nine months beginning on April 1st and ending—that is his operation actually ended December 14th. The creditors returned it to me on December 31.

Q. Of what year?

A. 19—the one before. 1961.

Q. In other words, the decline of volume in the store was really during Mr. Kuhn's ownership; isn't that right?

A. Yes, sir.

Q. Prior to the time that you sold it to Mr. Kuhn it had regained all that it lost from the Safeway and Food Giant openings and had reached an all-time high; isn't that right?

A. Yes, sir.

Q. Then you sold it to Mr. Kuhn?

A. Yes, sir.

Q. Do you think he was a competent market operator?

A. He had been successful for a five-year period that I knew of.

Q. Where?

A. He operated a market in West Los Angeles known as Lloyd's Market.

Q. Known as Lloyd's Market?

A. Yes, sir.

Q. Where was that more precisely?

[fol. 1417] A. 3474 Centinela Boulevard.

Q. A very small store, wasn't it?

A. About 4,000 square feet.

Q. What was Mr. Kuhn's sales volume in the last full month of his operation of your store, John's Market?

A. Last full month?

Q. Yes.

A. Of his operation?

Q. Yes.

A. I believe it was $55,000.

Q. How about the last full week—$55,000? I guess I can figure this. I want a weekly figure of what he was doing.

A. Probably about $12,000.

Q. What are you doing now per week, you?

A. Well, last week ten seven.

Q. Have there been any discount houses with food departments which opened in the general vicinity of your store within the last three years?

A. Yes, there is one on Rosemead Boulevard. I don't know the distance, but maybe a couple of miles or so. Maybe a little further, three miles.

Q. What is the name of that discount house?

A. Golden Rule.

Q. That is operated by Food Fair, is it not, or at least [fol. 1418] the food department?

A. I believe it is.

Q. Food Fair is also operating the remaining Fox Stores now, is it not?

A. I understand they are, yes, sir.

Q. Do you believe that any of the decline in the volume of your store is attributable in any way to this Golden Rule Discount House?

A. I have no way of knowing that.

Q. When did they open up, do you know?

A. When?

Q. Yes.

A. I don't know, sir.

Q. Was it in the year 1961 when Mr. Kuhn was operating your store?

A. I think so.

Mr. Vaughn: I have nothing further.

Mr. Bates: I have nothing further.

Mr. Knight: Mr. Reporter, may I offer this statement entitled "Testimony of John Taylor" as Taylor Exhibit No. 1, if there is no objection.

(The document referred to was marked by the notary public as Taylor Exhibit No. 1 for identification, a carbon copy of which is attached hereto.)

[fol. 1419] Recross-examination.

By Mr. Knight:

Q. Mr. Taylor, based upon your 15 years experience in the retail grocery trade in the Los Angeles metropolitan area would you say that the industry has become concentrated in fewer and fewer hands?

A. Yes, it appears to be.

Mr. Vaughn: I move to strike the answer for the purpose of objecting to the question and I object to the question as calling for the conclusion of the witness, also being confusing and ambiguous.

Mr. Knight: Off the record.

(Discussion off the record.)

Mr. Knight: That is all.

Redirect examination.

By Mr. Vaughn:

Q. Mr. Taylor, you say you believe that the grocery business is being concentrated in fewer and fewer hands; is that right?

A. Yes.

Q. Starting when did this start to happen?

A. I could go all the way back to the time when the

chain stores were generally expanding in the Los Angeles area.

Q. The 1930's?

[fol. 1420] A. Possibly so, yes, sir.

Q. Possibly so?

A. Yes, sir.

Q. You mean by that, I assume, that it has been concentrated in fewer and fewer hands, that there are fewer grocery concerns doing business in Los Angeles and Orange Counties than there were in the 1930's?

A. No, sir.

Q. What do you mean by it?

A. There are more concerns. However, the population has grown considerably too.

Q. If there are more concerns, Mr. Taylor, how can the business be concentrated in fewer and fewer hands?

A. The increased volume that they have obtained, and by the elimination of many small stores, including Safeway's small stores, even though they were closed voluntarily possibly. That is now being concentrated into fewer and larger organizations.

Q. You feel that there are more grocery concerns today than there were in 1930; is that right?

A. In number of stores?

Q. No. More separate concerns doing business.

A. Yes.

Q. More than there were in 1940?

A. Possibly.

[fol. 1421] Q. And more than there were in 1950?

A. No, I don't know about 1950,

Q. Isn't it just about the same, that is just about the same number of grocery concerns doing business in Los Angeles and Orange Counties now as in 1950?

A. I couldn't answer that question.

Q. You don't know?

A. No, sir.

Q. Do you know whether Safeway, its total sales in Los Angeles and Orange Counties as compared to the total grocery sales in those two counties, that is Safeway's share of the market, do you know whether that is larger or smaller than it was in 1952, let us say?

A. Share?

Q. Yes.
A. I would say it was larger.
Q. How about Ralphs?
A. I have no knowledge of their sales.

Mr. Vaughn: I have nothing further.
Mr. Bates: I have nothing further.

Recross-examination.

By Mr. Knight:

Q. Mr. Taylor, counsel just recently asked you questions going back to 1930's and 1940's. I ask you whether it is a fact that your experience in this industry simply goes [fol. 1422] back 15 years, sir; isn't that true?
A. My experience in the industry, yes, sir.

Mr. Knight: No further questions.
Do you have any more questions?
Mr. Vaughn: I have no more questions.

(Discussion off the record.)

Mr. Knight: Would you waive the signing of the deposition provided counsel have no objection?
The Witness: Yes.
Mr. Vaughn: We have no objection.

[fol. 1423] TESTIMONY OF MORRIS WALLEN

If subpoenaed to testify, Morris Wallen would testify as follows:

1. He was one of three partners who owned and operated the Liberty Market, 12161 South Paramount Boulevard, Downey, Los Angeles County, California. They operated the Liberty Market for about four years. The market was closed on November 9, 1960. In 1959, Liberty Market had sales of approximately $485,000. Mr. Wallen has been employed in various retail enterprises for the past 22 years and he formerly operated a grocery market for two years immediately after World War II.

2. In order to continue in business, a grocery retailer must keep well informed on every change in marketing conditions in the Los Angeles metropolitan area. He must be aware of all advertised grocery prices which his customers are apt to read. Therefore, he closely inspected all grocery advertising by the major chains as it appears in the metropolitan newspapers. He also regularly reviewed grocery advertising appearing in local papers. He subscribed to the Key Services and followed the prices of all of the major chains appearing in these booklets. In keeping abreast of the retail grocery trade generally, he regularly read, among other publications, the "Commercial Bulletin," "Super Market Merchandising," "Chain Store [fol. 1424] Age" and the "Progressive Grocer."

3. On the basis of his continued study of retail grocery merchandising in the Los Angeles metropolitan area, the witness would testify that in the period since 1950 the number of single store grocery retailers operating in the area declined. When shown the Government exhibits prepared by the State Board of Equalization, he would state that they confirm his own observations. He would state that this lessening in the number of independent grocers has been obvious to him as a result of his observations.

4. He would testify that single store operators cannot get into the more desirable shopping centers. It is a well-known fact in the industry that the major developers will not lease a shopping center location to anyone but a major chain. This is because only these chains have Triple A financial status and because the landlord wants the name of a big chain store in his shopping center as an attraction to other tenants. As a result single store operators do not have access to desirable locations in shopping centers. On the other hand, most of the new openings, particularly in the new shopping centers, have been made by the chains with Triple A financial status.

5. He has observed that the decline in the number of grocery stores in the area also arises from the increasing size of supermarkets and their large, continually expanding [fol. 1425] dollar sales. The large supermarkets today serve many more people than they did in the past. As a result fewer grocery stores are needed in the area to serve a comparable number of people.

6. The witness would testify that single store operators and small chains do not have their own highly developed distribution system. He would point out that he has observed that chains, such as Von's Grocery Company and Shopping Bag Food Stores, operate large warehouses, are serviced directly by railroad shippers at these warehouses, and operate large trucking facilities. As a result they are able to buy in heavy volume directly from the producer and deliver the product to their stores on their own trucks. This gives chains, such as Von's and Shopping Bag, an advantage over independents and small chains in terms of inventory control.

7. He would also testify that he purchases from a cooperative group known as Orange Empire and this enables him to get certain of the advantages, such as quantity discounts, enjoyed by the chains on dry grocery products. He would state that the cooperative does not carry such major products as dairy, meat and produce items. However, he would testify that large chains, such as Von's and Shopping Bag, belong to cooperatives but have decreased their purchases voluntarily when they developed their warehousing [fol. 1426] and distribution systems. Thus they have combined the advantages of the cooperative with direct purchasing and highly developed distribution system. In addition some of the chains, including Von's and Shopping Bag, belong to a dairy cooperative named "Jersey Maid," which gives them advantages over grocery stores which do not belong to Jersey Maid.

8. He would also testify that on the basis of his continued study of the retail grocery industry in the Los Angeles metropolitan area, he is in agreement with the defendants' exhibits showing that in the period between 1950 and 1958 the market share of the 8 largest chains in the area increased from 33.2 per cent to 39.0 per cent; the market share of the 9 largest chains increased from 34.3 per cent to 41.7 per cent; the market share of the 15 largest chains increased from 38.4 per cent to 50 per cent; and the market share of the 20 largest chains increased from 40.5 per cent to 54.4 per cent. When shown the tables prepared from the Bureau of Census reports by the Government economist, he would testify that these figures also corroborate his own understanding, based upon his ex-

perience, of the trends in the area. He would further state that the strike in 1959 definitely had an adverse effect on the sales of the largest chains.

9. He would state in his testimony that he observed [fol. 1427] the operations of Von's and Shopping Bag prior to the merger. He would testify that both of these chains advertised extensively on an area-wide basis, that they played a part in the competitive merchandising of groceries in the area, that they were profitable operations which had experienced a history of successful growth and expansion. He would state that they were two of the largest chains in the area.

10. He would state that Von's and Shopping Bag, along with Ralph's, Safeway, Market Basket, Thriftmart, Alpha Beta, Mayfair and Food Giant, were among the leading firms in the area.

11. He would testify it is common knowledge in the grocery industry that Von's and Shopping Bag have operated as one chain since the merger in March 1960. The two firms now have a single management; their warehousing facilities have been combined; their advertising is consolidated; the search for a new location is now the responsibility of one organization instead of two; the inventory in the stores has been adjusted with the result that the stores of both firms now carry the lines and the stores are known as "Von's & Shopping Bag."

12. He would testify that he is aware of the recent statement by Mr. Theodore A. Von der Ahe, the president of Von's, that the competition which Von's faces has not been "cut throat" or "devastating" and that there are no [fol. 1428] "intense price wars." He would testify, however, that he faces very vigorous competition from Von's.

13. He would also testify that there have been a number of acquisitions and consolidations in the retail grocery field since 1948. He would state that the merger between Von's and Shopping Bag was the largest consolidation of grocery chains in the Los Angeles area in recent years.

14. He would state that if this merger of Von's and Shopping Bag is permitted there will probably be subsequent mergers between and involving the other major chains, and in all likelihood it will develop that a few large grocery chains will dominate retail grocery distribution

throughout the Los Angeles metropolitan area. This merger is a major stride in increasing the market share of the large chains and it will accentuate the large chains' advantages over the small grocer. The merger of Von's and Shopping Bag will have the effect of substantially lessening competition and tending to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area.

[fol. 1429] Mr. Coyle: If your Honor please, with respect to the affidavits——

The Court: Now, counsel, you can make any type of opening statement you prefer. If you think an opening statement will be helpful to the court, I will be glad to have you make one.

Mr. Coyle: All right, your Honor. I would like to clear up one small matter before that.

We filed the affidavits of our so-called expert witnesses this morning. I don't know just what we should do with them, whether we should make some arrangements for them to be copied into the record also. These are these statisticians and so forth that prepared these exhibits.

The Court: You mean the ones that are going to testify?

Mr. Coyle: No, the ones that are not going to testify.

The Court: All right, I see.

Mr. Coyle: We filed about five or six affidavits this morning of these FBI people and other people.

The Court: I see. Well, I suppose under the procedure we are following, is that satisfactory with counsel for the defense?

Mr. Alsup: Yes, your Honor.

May I inquire of Mr. Coyle whether the documents so filed are identical with those that have been given to us.

[fol. 1430] Mr. Coyle: Yes.

Mr. Alsup: I call your Honor's attention to, if I may, to the affidavit of Dr. Willard F. Mueller. He is a statistician, an economist with the Federal Trade Commission, has made no study of this marketing area, and has gone through some statistics collected by the Federal Trade Commission and drawn certain conclusions, most of which are—or all of which are refuted in the affidavit of Mr. Von der Ahe.

But I call your attention, your Honor, to the last page, which would be page 4, although it is not numbered.

The Court: Yes.

Mr. Alsup: And the line commencing at line 3:

> "If the remaining five of the top 20 chains had been covered by our survey it is probable that they also acquired stores and the total market share would be further reduced. It is therefore apparent that a good part, if not all, of the increasing concentration in the 20 largest grocery chains resulted from acquisitions."

Now, I think this is entirely improper from a man sitting back in Washington who speculates on what might have happened as to five chains he didn't even study.

The Court: I will resolve that by telling you now I [fol. 1431] will give it such weight as it is entitled to.

Mr. Alsup: Thank you, your Honor.

Mr. Coyle: Your Honor, there is a lot of independent testimony that there were a lot of acquisitions by those chains——

The Court: That goes to weight, I think, counsel. I will give it such weight as it should receive.

Mr. Coyle: Yes.

Now, your Honor, I do have——

The Court: Now, you know, a person can take the stand and tell me all about the moon, and I know he must be a great scientist. But I don't have to accept everything he says.

Mr. Coyle: If your Honor please, I do have a brief opening statement that I think I should probably make at this time before I call our next witness.

The Court: Go ahead, counsel.

I am not meaning to discourage expert testimony, because there is a place in the court for it. But we have gotten to a point in America today where everybody becomes an expert overnight on everything.

I had a doctor not long ago who was testifying on heart conditions, and ended up by qualifying himself as an electrician. So that is what I mean.

So I am certainly going to listen to the testimony of [fol. 1432] the experts, but I am going to examine into whether or not they are experts—not self-appointed, but by experience and training.

Mr. Alsup: I neglected to mention, your Honor, that in

connection with one of the government's expert witnesses, Mr. John Marshall of the State Board of Equalization, whose affidavit was just received, we took his deposition, and we would like that deposition to be copied after that affidavit as well; and he also identified certain exhibits and we will want to offer those exhibits.

The Court: Well——

Mr. Coyle: If your Honor please, I think those exhibits have already been marked as defendant's exhibits. I presume they will be submitted.

The Court: If they have already been marked, counsel, as defense exhibits, I don't think you will have any problem. We will take the defense exhibit number rather than the deposition.

Mr. Alsup: That is correct, your Honor.

The Court: Yes.

Mr. Alsup: But we would like the deposition copied into the record also.

The Court: It is so understood.

Now, I will assume that if there is any mechanical problems, you will have to work that out with the reporter, [fol. 1433] both of you.

Mr. Alsup: Yes, your Honor.

The Court: All right.

[fol. 1434] (The affidavits and deposition of John B. Marshall, referred to by counsel, appear in the following words and figures, to wit:

Affidavit of Gerald D. Harrison

Gerald D. Harrison, being first duly sworn, deposed and says:

1. I am a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice and also a registered California Public Accountant. I have been a Special Agent and an Accountant for twenty-two years and have been assigned to accounting and antitrust statistical work about 50 per cent of that time. I have a Bachelor of Commercial Science degree from Benjamin Franklin University, Washington, D.C.

2. Since October 1960, I have been assigned by the Fed-

eral Bureau of Investigation to the task of assembling and compiling statistical data relative to the Government's case in *United States* v. *Von's Grocery Company and Shopping Bag Food Stores.*

3. The data which appears on Plaintiff's Exhibit 4 shows the 1958 sales figures of the top ten grocery chains in the Los Angeles metropolitan area, consisting of Los Angeles and Orange Counties. I either personally collected or supervised the collection of sales figures for the 36 grocery chains considered as the top chains in the area, other than [fol. 1435] the two defendants in this case. The figures contained in Exhibit 4, other than those of Von's and Shopping Bag, which were obtained from the defendants and supplied to me by the Antitrust Division, were given to the Bureau by the respective companies and they are limited to the sales of these chains in Los Angeles and Orange Counties.

(Paragraph No. 4 was stricken.)

5. From the sales data accumulated by the Bureau and referred to in paragraph 3 herein, I supplied the Antitrust Division with the figures of Gateway Markets, the twenty-first chain in the area in 1958. This figure is reflected in percentages found in the "After Merger" column of Plaintiff's Exhibit 8.

6. Plaintiff's Exhibit 1 sets forth the top twenty grocery chains in the Los Angeles metropolitan area in 1958 in terms of dollar sales. This Exhibit is based upon data which the Bureau acquired and also data supplied by the defendants.

/s/ Gerald D. Harrison.

[fol. 1436] AFFIDAVIT OF HARRISON F. HOUGHTON

HARRISON F. HOUGHTON, being first duly sworn, deposed and says:

1. I am the Senior Economist of the Banking and Currency Committee of the United States House of Representatives and have been engaged in economic analysis in Government and private industry for the past 26 years.

2. I received a B.C.S. degree from Drake University in 1933, majoring in accounting and economics. I took graduate work in economics and business administration at Columbia University from 1933 until 1936, when I was employed as an economist with the National Industrial Conference Board. I was Assistant Chief and later Chief of the Department of Business Research, and engaged in preparing industrial reports covering such industries as automobiles, railroads, iron and steel, construction and others, and also prepared reports on current business trends and developments. I entered government service in January 1941 as an economic analyst with the Bureau of Labor Statistics, where I prepared special reports on industrial developments and their effect on employment, working hours, wages, and related matters.

3. From May 1942 until September 1944, I was an economist with the War Production Board, and engaged in preparing studies of munitions programs, output potentials, facilities and production with relation to requirements of [fol. 1437] critical raw materials. During this period I was also a commodity specialist on military requirements for aluminum and magnesium. From October 1944 until January 1946, I was an economist for the Smaller War Plants Corporation and engaged in preparing special studies, for submission to Congress, on the problems of small business in connection with the war and reconversion periods, as well as special studies on changes in the relative position of small business. I was coauthor of the Small War Plants Corporation report entitled "Economic Concentration and World War II" (Senate Small Business Committee, 79th Congress 2d Session, Document No. 206, 1946.)

4. During the period from January 1946 until April 1947, as an economist with the Department of Commerce I prepared studies of the structure of various industries, including reports relating to merger activity. From April 1947 to March 1951, I was employed as an economist by the Federal Trade Commission, and engaged in the preparation of economic reports (including reports with respect to the merger movement), specializing in the analysis of data on economic concentration. While at the Commission I also prepared material for submission to Congressional Committees with respect to proposed amendments to Sec-

tion 7 of the Clayton Act. I assisted in the preparation of an economic report for the Commission on the iron ore industry.

[fol. 1438] 5. From March 1951 until July 1961, I was an economist with the Antitrust Division of the Department of Justice. As a Senior Economist in the Antitrust Division, I prepared economic and statistical materials, exhibits, affidavits, and appeared as an expert witness in behalf of the Government in a number of antitrust cases including *United States* v. *Times Picayune Publishing Co., et al.*, *United States* v. *Kansas City Star Co., et al.*, *United States* v. *Bethlehem Steel Corp., et al.* and *United States* v. *Brown Shoe Co., et al.* I also prepared economic and statistical studies in connection with *United States* v. *Atlantic & Pacific Tea Co.* (Civil case).

6. As Senior Economist assigned to the preparation of statistical data for the Government in *United States* v. *Von's Grocery Company and Shopping Bag Food Stores*, I prepared factual memoranda and various statistical exhibits and appeared as a government witness in connection with the Motion for a Preliminary Restraining Order. I have participated in the planning and development of the economic materials for use in the trial of this case, including all of the exhibits described herein.

7. In July 1961 I became Chief Economist of the Small Business Committee of the House of Representatives, and since January 1963 I have been Senior Economist of the Banking and Currency Committee of the House of Representatives. Since the assumption of my positions with the [fol. 1439] House Small Business Committee and the House Banking and Currency Committee, I have continued to act in a consulting capacity to the Department of Justice in connection with this case.

8. Plaintiff's Exhibit 4 shows the position of Von and Shopping Bag in respect to dollar volume of sales of groceries and related products in 1958 in the Los Angeles Metropolitan Area, and indicates the rank and percentage of total sales represented by Von and Shopping Bag as well as the other chains among the ten largest in the area. The tabulation also shows on a pro-forma basis the percentage of total sales and rank of the combined sales of Von and Shopping Bag. The sources of the data are indicated in the

footnotes on the exhibit. The determination of the composition of the ten largest grocery chains was based on sales of 1958 made by such chains in the Los Angeles Metropolitan Area, based on data compiled by the Federal Bureau of Investigation from a total of 39 large grocery chains in the area. The total sales of all grocery stores in the Los Angeles Metropolitan Area was secured from the United States Bureau of the Census. (United States Department of Commerce, Bureau of the Census, Retail Trade, California, 1958 Census of Business, p. 5-22.)

9. Plaintiff's Exhibit 5 shows the growth in sales for each defendant from 1954 to 1958, based on each defendant's sales only within the combined area of Los Angeles and [fol. 1440] Orange Counties. The data were secured from defendants.

10. Plaintiff's Exhibit 6 shows the increase in concentration of grocery sales in the 20 largest chains in the Los Angeles Metropolitan Area from the year 1948 to 1954 to 1958. The source for the total grocery store sales for each of the years is contained on the exhibit itself. The source for the sales of the 20 largest chains in the Los Angeles Metropolitan Area in each of the years was obtained from the Bureau of the Census in a special tabulation known as Table 1, which is attached to a certification of the Bureau of the Census. The area used by Census, although captioned differently, is identical to the Los Angeles Metropolitan Area as defined in the Pre-Trial Conference Order of April 24, 1961. By mathematical process, I arrived at the percentage of sales represented by the top 20 chains in each of the three years.

11. Plaintiff's Exhibit 7 shows the changes of concentration in the 4, 8, 12, 16 and 20 largest grocery chains in the Los Angeles Metropolitan Area from 1948 until 1958 in percentages of total grocery store sales. This graph depicts the increasing share of the top 20 chains within the area with breakdowns in groups of 4 chains. This graph was compiled from Census data contained in Table 1 attached to the hereinbefore described Census certification. The total sales upon which the percentages were based are contained, for 1948, in Volume III, Retail Trade Area [fol. 1441] Statistics, pages 4 and 5 and, for 1958, United

States Department of Commerce, Bureau of the Census, Retail Trade, California, 1958 Census of Business, p. 5-22.

12. Plaintiff's Exhibit 8 shows the concentration in the 4, 8, 12, 16 and 20 largest grocery chains in the Los Angeles Metropolitan Area for 1958, and it also shows, for the same year, the percentage of sales of the above groupings on a pro-forma basis had the Von-Shopping Bag merger been in effect at that time. The "After Merger" column depicts the increasing share of the top 20, particularly the top four. This exhibit is derived from the same source as Exhibits 6 and 7 described above. The sales of the 21st chain in the area in 1958 were added to the "Before Merger" column to form the "After Merger" column. The Federal Bureau of Investigation obtained this sales figure on No. 21.

13. Plaintiff's Exhibit 3 compares the population of the Los Angeles Metropolitan Area with that of eleven states plus the District of Columbia. This exhibit shows that in the Census Year 1960 the Los Angeles Metropolitan Area had a greater population than these twelve jurisdictions combined. The source of this information is the United States Department of Commerce, Bureau of the Census, United States Census of Population 1960.

14. Plaintiff's Exhibit 2 compares the population of the Los Angeles Metropolitan Area with that of the ten largest [fol. 1442] states in the United States. This exhibit shows that in the Census Year 1960 the Los Angeles Metropolitan Area ranked just behind the seven leading states in the Nation in terms of population. The source of this information is the United States Department of Commerce, Bureau of the Census, December 1960, and Advance Reports Final Population Accounts, 1960 Census of Population.

/s/ Harrison F. Houghton.

[fol. 1442a] PLAINTIFF'S EXHIBIT No. 87

APPENDIX TO AFFIDAVIT OF HARRISON F. HOUGHTON

DEPARTMENT OF COMMERCE
Bureau of the Census
Washington 25, D. C.

December 28, 1961.

I Hereby Certify that the annexed is a true copy of the original special tabulation on Multiunit Grocery Companies in the Los Angeles-Long Beach, California, Standard Metropolitan Statistical Area, compiled from returns made in the 1948, 1954, and 1958 Censuses of Business, which are on file in the Bureau of the Census.

[Seal] U.S. Department of Commerce, Bureau of the Census.

/s/ Richard M. Scammon, Director, Bureau of the Census

[fol. 1442b] DEPARTMENT OF COMMERCE
Bureau of the Census
Washington 25, D. C.

Table 1—The companies included in this table are those which had the largest sales volume in the Los Angeles-Long Beach Standard Metropolitan Statistical Area as reported in each of the Census years.

	1948		1954		1958	
	Establishments (number)	Sales ($1,000)	Establishments (number)	Sales ($1,000)	Establishments (number)	Sales ($1,000)
4 largest	325	238,289	303	408,707	263	489,882
8 largest	411	309,709	397	583,216	400	820,732
12 largest	463	357,353	418	653,429	479	979,742
16 largest	489	383,149	446	709,709	510	1,073,132
20 largest	513	403,089	464	754,825	538	1,142,565

[fol. 1442c] DEPARTMENT OF COMMERCE

Bureau of the Census

Washington 25, D. C.

Table 2—This table provides the 1954 and 1948 Census of Business data, as reported in these Censuses, for the 20 grocery multiunit companies which in the 1958 Census of Business reported the largest volume of sales in the Los Angeles-Long Beach Standard Metropolitan Statistical Area. The array by size is based on the 1958 Census of Business reports.

	1948		1954		1958	
	Establishments (number)	Sales ($1,000)	Establishments (number)	Sales ($1,000)	Establishments) (number	Sales ($1,000)
4 largest	325	238,289	303	408,707	263	489,882
8 largest	385	287,868	386	569,555	400	820,732
12 largest	426	323,539	413	625,067	479	979,742
16 largest	432	332,929	433	670,190	510	1,073,132
20 largest	442	345,738	447	698,270	538	1,142 565

[fol. 1442d] 13 U.S.C. 3 as amended

§ 3 Seal

The Bureau shall have a seal containing such device as has been selected heretofore, or as the Secretary may select hereafter. A description of such seal with an impression thereof shall be filed in the office of the Secretary of State. The seal shall remain in the custody of the Secretary or such officer or employee of the Bureau as he designates, and shall be affixed to all certificates and attestations that may be required from the Bureau. Judicial notice shall be taken of the seal. As amended Aug. 28, 1957, Pub. L. 85-207, § 2, 71 Stat. 481.

[fol. 1443] AFFIDAVIT OF THOMAS H. LINDEN, SR.

THOMAS H. LINDEN, SR., being first duly sworn, deposed and says:

1. I am the president of Marketing Services Corporation of 8327 S. Garfield Avenue, Bell Gardens, California. I organized the company ten years ago and have been president ever since. Marketing Services Corporation is engaged in the assembly and publication of pricing information for the grocery business in Southern California. During the past thirty years I have been connected with the retail

grocery business as retail clerk, general manager and buyer in various independent and chain stores in the Los Angeles area.

2. Among the publications of Marketing Services Corporation is the "Competitive Survey" book, now known as the Key Survey book. In the Key Survey book I list about 3000 dry grocery (grocery, meat, produce and delicatessen) items along with the shelf prices of the major grocery chains operating in Southern California. This is a weekly publication which is sold to all major chains in Southern California plus many independents.

3. Customer demand governs the grocery chains which are surveyed and which appear in the Survey Book. Other factors which determine the selection of stores surveyed are the size of a chain and its geographical coverage of the [fol. 1444] area. The prices contained in the Key Survey Book are accumulated by physically checking the shelf price of the chains listed.

4. Plaintiff's Exhibit 21 is a copy of the April 18, 1958, edition of the Key Book. At the time of the publication of that issue, it was determined that the major chains in the Los Angeles Metropolitan Area consisted of Ralph's, Safeway, Von, Shopping Bag, Alpha Beta, Market Basket and Thriftimart.

5. Plaintiff's Exhibit 22 is a copy of the July 27, 1960 issue of the Key Book. In that publication, the major chains in the Los Angeles Metropolitan Area were listed as Ralph's, Safeway, Von, Alpha Beta, Market Basket, Thriftimart and Fox.

6. In Plaintiff's Exhibit 22 Shopping Bag Market was dropped from the Key Survey Book due to the merger of this chain with another major chain already listed in the Key Survey Book viz, Von's. We assumed that after the merger, although Shopping Bag continued in existence, the prices in Von's & Shopping Bag would be the same thus eliminating further need of Shopping Bag Name.

/s/ Thomas H. Linden, Sr.

[fol. 1445] AFFIDAVIT OF WILLARD F. MUELLER

DR. WILLARD F. MUELLER, being first duly sworn, deposes and says:

1. I am Chief Economist of the Federal Trade Commission and Director of the Bureau of Economics. I have served in this capacity since July 1961. In this capacity, I am responsible for directing the program and policy of the Bureau of Economics' three operating divisions, the Division of Economic Evidence, the Division of Economic Reports, and the Division of Financial Statistics.

2. From March 1961 through June 1961, I served as Chief Economist of the Select Committee on Small Business, United States House of Representatives.

3. From 1957 until March 1961, I was on the staff of the University of Wisconsin, and I am currently on leave of absence from the University of Wisconsin. At Wisconsin I am Professor of Agricultural Economics with responsibilities in teaching and research in the area of industrial organization and competition of the food industries. I have responsibilities for graduate and undergraduate courses in the economics of the food industry, industrial organization and public policy, and participate in teaching a seminar in the Law School entitled "Imperfect Competition and the Law." I am on the staff of American University in Washington, D.C. and during the fall term I teach a course [fol. 1446] entitled "Industrial Organization and Public Policy."

4. From 1954 to 1957, I was on the staff of the University of California. My chief research responsibilities dealt with the industrial organization of the food industry.

5. I have B.S. and M.S. degrees in economics from the University of Wisconsin and a Ph.D. degree from Vanderbilt University. My major area of study for the Ph.D. dealt with economic analysis of industrial organization and public policy. My minor field of interest was law.

6. During the past 10 years I have conducted and directed many research projects in the food and other fields. My research results have appeared as research bulletins of the University of California and the University of Wisconsin, and in various professional journals, including *The American Economic Review, Review of Economics and*

Statistics, Journal of Business of the University of Chicago, *Journal of Farm Economics, Journal of Land Economics, Journal of Marketing* and *Southern Economic Review.* In addition, I am co-author of a book entitled *The Changing Market Structure of Grocery Retailing,* published in 1961.

7. During the past several years I have served as an economic consultant to the House Small Business Committee, Senate Small Business Committee, Department of Agriculture, the Antitrust Division of the Department of Justice, and private firms on matters of industrial organi- [fol. 1447] zation and competitive behavior in the food industry.

8. At the request of the Antitrust Division of the Department of Justice and with the permission of the Federal Trade Commission, I have prepared the exhibits cited below. All of these exhibits are based on questionnaires answered under oath by an officer and prepared by the responding companies in connection with the Federal Trade Commission's Inquiry in Food Marketing, 1959. The companies supplying this information were required to do so under the authority conferred upon the Federal Trade Commission by Section 6 of the Federal Trade Commission Act. In 1959, the Federal Trade Commission obtained completed questionnaries from all grocery chains which were known to have had 11 or more grocery stores in 1958.

9. Government Exhibit No. 44 lists 136 grocery stores located in Los Angeles and Orange Counties which were acquired by nine of the top twenty grocery chains which were known to have eleven or more stores at the time of the survey. In the ten instances where there were known acquisitions among and between the top twenty chains, parentheses have been placed around these stores and their sales have been excluded from the totals. The 126 stores acquired from grocery concerns outside of the top twenty chains had combined sales of $231,017,000, in the year prior to their acquisition.

10. Government Exhibit No. 45 sets forth the number and sales of the acquired stores which were still operated by the acquiring chain in 1958.

[fol. 1448] This exhibit shows that 99 of the 126 stores acquired from grocery concerns other than the top twenty

grocery chains were still operated by the acquiring chain and had sales of $192,916,000 in 1958.

11. Plaintiff's Exhibit No. 6 shows that the market share of the top twenty chains in the Los Angeles Metropolitan area increased from 43.8% in 1948 to 56.9% in 1958. The market share of the top twenty in 1958 would drop to 47.3% if the sales of the top twenty were reduced by $192,916,000, i.e., by the 1958 sales of stores acquired by the fifteen chains covered by our survey. If the remaining five of the top twenty chains had been covered by our survey it is probable that they also acquired stores and the total market share would be further reduced. It is therefore apparent that a good part, if not all, of the increasing concentration in the twenty largest grocery chains resulted from acquisitions.

/s/ Willard F. Mueller

[fol. 1449] AFFIDAVIT OF JOSEPH T. DESILVA

JOSEPH T. DESILVA, being first duly sworn, deposes and says:

1. I am Executive Secretary of the Retail Clerks Union, Local 770, chartered by the Retail Clerks International Association, AFL-CIO. The jurisdiction of Local 770 is exclusively within and comprises a major part of Los Angeles County as depicted on the attached map. The membership of Local 770 is approximately 18,500, of which approximately 15,000 are employed in grocery stores. I have been in my present position for the past twenty-four years as the elected executive officer of Local 770. My duties include responsibility for formulating Union policy for recommendation to the Executive Board, the negotiation and administration of collective bargaining agreements, and maintaining a continuing program of study of economic and social conditions as they may affect future negotiations and the rights of Union members. I also serve as Trustee on a number of jointly administered Trust Funds relative to employee benefits. The business address of Local 770 is 5955 Hollywood Boulevard, Hollywood 28, California.

2. Since 1956 I have served as spokesman in negotiations for the nine Retail Clerks Union locals in Southern California, with a total membership of approximately 40,000,

of which approximately 32,000 are employed in grocery stores. The jurisdiction of these unions includes all of Los [fol. 1450] Angeles and Orange Counties. Commencing in 1923, and until the time of my employment with the Union in 1937, I held a number of positions in the grocery industry ranging from retail clerk to buyer and supervisor of a chain of fourteen stores known as the E. F. Smith Markets.

3. In the course of the past twenty-eight years I have known and dealt with the people who have been the major developers of the grocery industry of this area, and have been required by the nature of my position to maintain a current knowledge of developments in this field.

4. The most recent major labor dispute in the grocery industry in Southern California was in January, 1959. The prior collective bargaining agreement terminated at midnight on December 31, 1958. The Food Employers Council, Inc. was spokesman for the major grocery store employers. Deadlock was reached at midnight, and at that time Local 770 struck the Hollywood Ranch Market, 1248 Vine Street, in Hollywood. The store continued to operate with supervisorial personnel until it was closed by the owner at approximately 7:00 P.M. on January 1, 1959. Most of the other grocery stores were closed because of the holiday on New Years Day. On January 2, 1959, grocery stores doing approximately 80% of the grocery business in the area of Local 770 did not open because of this labor dispute. All [fol. 1451] of the major chains operating in our jurisdiction, including those listed in the document identified as Plaintiff's Exhibit B-8, were closed, except McDaniels Markets, which was not a member of the Food Employers Council, Inc., and which remained open for the duration of the dispute. Greater All-American and McCoy's were not in Local 770's jurisdiction. The stores remained closed until January 28, 1959, at which time our current five-year agreement was signed. Approximately 400 other small chain stores and independents remained open during this twenty-eight-day period in which the new contract was negotiated. These stores provided the food and allied items to the people of Los Angeles County.

5. In the course of maintaining research files for the negotiation and administration of contracts it is necessary for Local 770 to keep records of new stores, acquisitions,

and sales for the purpose of insuring appropriate contract coverage and maintenance of contract benefits. Specifically, we have in our research file information concerning the developments of the Hughes Markets, Fox Markets, Yor-Way Markets and Lucky Stores, which are summarized below. Each of these chains initiated its grocery store business in the Los Angeles area by acquiring the assets of existing grocery operations in the area.

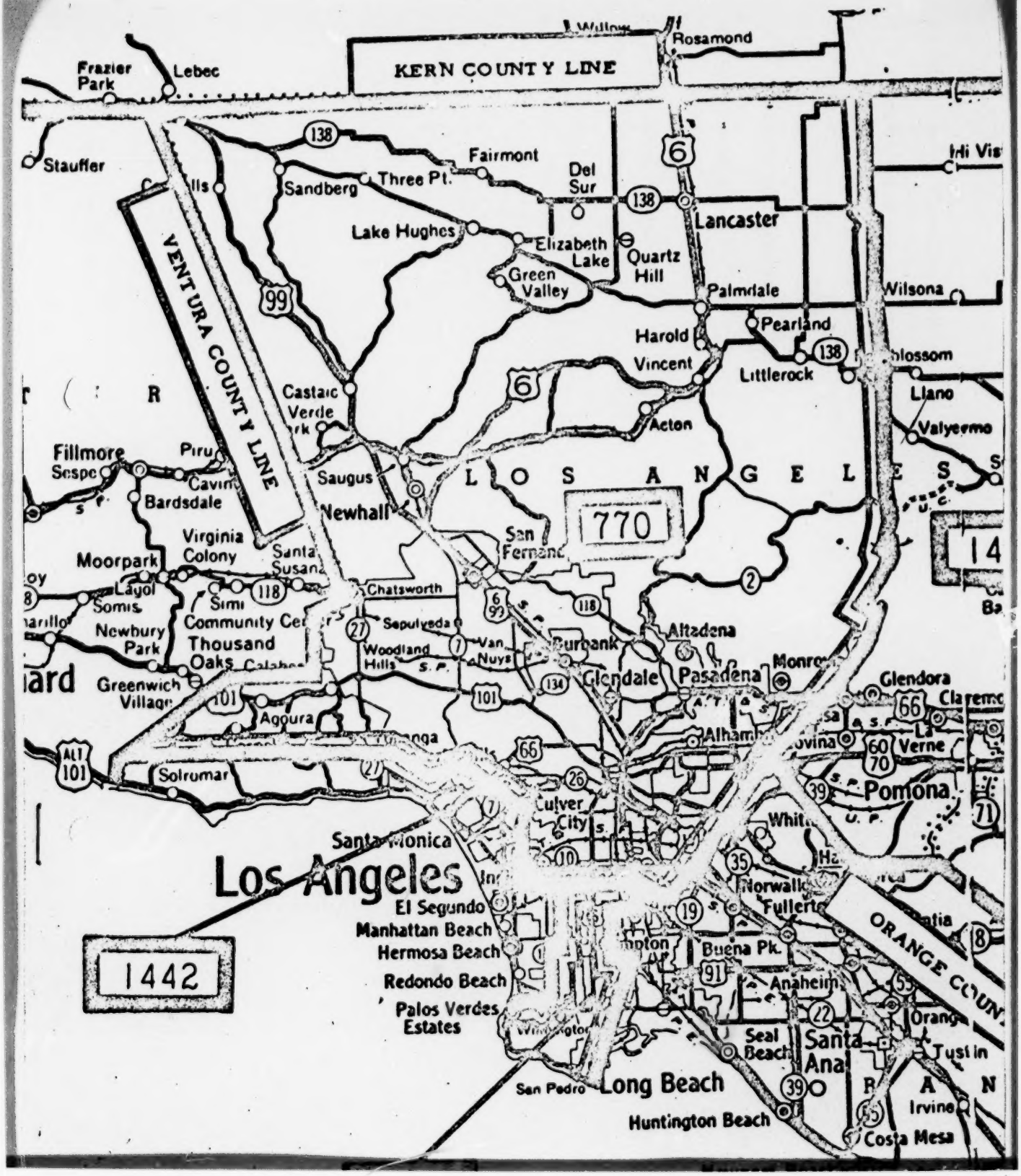
[fol. 1452] 6. Hughes Markets were founded in 1952 by Joseph P. Hughes, former Vice President in charge of Field Operations for Fitzsimmons Stores Limited (now Thriftimart, Inc.). He began with one store purchased from Thriftimart, and soon thereafter purchased two more stores, one independent and another Thriftimart. Since that time he has acquired several other stores. He operated as a partnership with his wife until incorporated as Hughes Markets, Inc. in 1957.

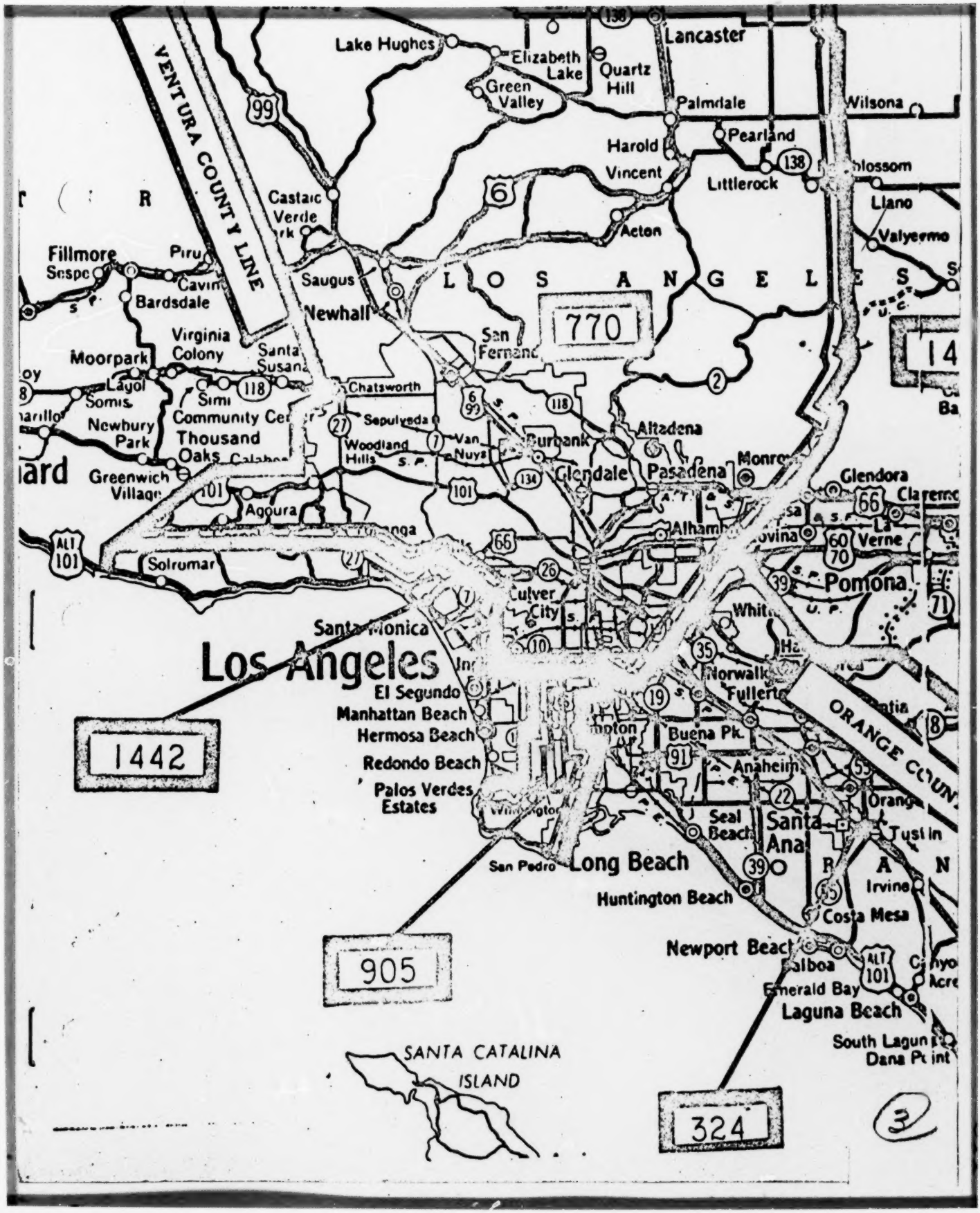
7. Mr. Edwin J. Fox left Mayfair Markets in 1954 and started the chain of Fox Markets by purchasing grocery stores from Mayfair and Lamar's. He later acquired other Mayfair stores, the Roth's Markets chain, the Pessin Markets chain, the Iowa Pork Markets chain, and other acquisitions. In 1961 Fox filed in bankruptcy.

8. Mr. Jack Kennedy left the Jim Dandy Market Company to establish the Yor-Way chain in 1953. He began with the purchase of a Mayfair Market and later acquired several more. In 1958 Yor-Way acquired the C. S. Smith Metropolitan Markets. After Mr. Kennedy's death in 1961, the stores were sold.

9. Lucky Stores, Inc., which now operates a total in excess of 114 stores on the West Coast, entered this area with the purchase of the Jim Dandy chain of grocery stores in 1956. In 1959 also purchase the Hiram's Market chain.

/S/ Joseph T. DeSilva.




VENTURA COUNTY LINE
Lake Hughes
Elizabeth Lake
Quartz Hill
Lancaster
Green Valley
Palmdale
Wilsona
Pearland
Harold
Vincent
Littlerock
Blossom
Llano
Valyermo
Castaic
Verde Park
Acton
Fillmore
Piru
Sespe
Cavin
Bardsdale
Saugus
Newhall
L O S A N G E L E S
770
Virginia Colony
Santa Susana
Moorpark
Lagol
Somis
Simi
Community Center
Thousand Oaks
Newbury Park
Greenwich Village
Chatsworth
Sepulveda
Woodland Hills
Van Nuys
Burbank
Glendale
Pasadena
Altadena
Monrovia
Glendora
Claremont
La Verne
Pomona
Agoura
Solromar
Culver City
Santa Monica
Los Angeles
El Segundo
Manhattan Beach
Hermosa Beach
Redondo Beach
Palos Verdes Estates
1442
Norwalk
Fullerton
Buena Pk.
Anaheim
Seal Beach
Santa Ana
Orange
Tustin
ORANGE COUNTY
San Pedro
Long Beach
Huntington Beach
Irvine
Costa Mesa
Newport Beach
Balboa
Emerald Bay
Laguna Beach
South Laguna
Dana Point
905
SANTA CATALINA ISLAND
324
3

[fol. 1452b] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES H. CARR, Judge Presiding

No. 336-60-CC Civil

[Title omitted]

Transcript of Proceedings—June 11, 1963

Place: Los Angeles, California

* * * * * * *

[fol. 1453] AFFIDAVIT OF JOHN B. MARSHALL

JOHN B. MARSHALL being first duly sworn, deposes and says:

1. I am the Senior Statistician of the Office of Research and Statistics of the State Board of Equalization for the State of California, located at 1020 N Street, Sacramento, California. I have held this position for fourteen years. My duties consist of compiling statistical data relative to taxes administered by the Board. I was responsible for the development of outlet and taxable sales data by type of business for each of the State's 58 and 382 cities, revenue forecasts for each of the tax programs, the preparation of the Annual Report of the Board, and special reports concerning the many facets of the Board's operations.

2. I have a Bachelor of Science degree in Economics from the University of California. Since graduation in 1934, I have worked on research projects for a number of State agencies. My employment during the past 26 years has been as follows: ten years of Ratio and Analysis work for the State Workmen's Compensation Insurance Fund as a statistician for the State Department of Employment: 1½ years with the State Reconstruction and Re-employment Commission as a special field representative developing information on business opportunities for returning veterans of World War II; one year with the Office of Planning in the Governor's Office developing statistics [fol. 1454] in support of Governor Warren's prepaid medi-

cal care program; and the aforementioned 14 years with the State Board of Equalization.

3. The State Board of Equalization in the course of its regular and established duties collects and compiles data relative to tax matters which reflect various aspects of all permittees including all grocery stores. Form S-401 is used by the Board to obtain these sales data.

4. Every grocery store in California must be licensed by the State Board of Equalization. Before going into business a grocery operator is required to obtain a permit to operate a grocery store at a specific location. Such permits are obtained at the local offices of the State Board of Equalization. Grocery operators are also required to report to the Board when they discontinue a business at any location. The operator is required to give us both his mailing and business addresses, and each store is identified by its address and falls within a certain city or in the unincorporated area of a county.

5. It is my responsibility to maintain a count of the outstanding permits in each jurisdiction of the State. It is part of our regular procedure to classify retail establishments according to their principal type of business as measured by gross receipts and to maintain counts of stores by single outlet and by multiple outlet categories.

[fol. 1455] 6. It is one of my duties to publish periodic reports on the number of outstanding permits and taxable sales by type of business and to make other appropriate statistical analyses. As a service, we compile and make certain statistical data available to private parties and various governmental agencies on a reimbursable basis.

7. Commencing in July 1960, at the request of the Antitrust Division of the United States Department of Justice, there have been assembled and compiled under my supervision and direction certain statistics of the State Board for use in connection with *United States* v. *Von's Grocery Company, et al.*, Civil Action No. 336-60-CC, now pending in the Southern District of California, Central Division. We have also prepared and furnished to the law firm of O'Melveny & Myers certain statistics for use in the same litigation.

8. The records of the State Board indicate that on January 1, 1950, there were 5,365 single outlet grocery stores and 856 multiple outlet grocery stores operating in

the Los Angeles Metropolitan area for a total of 6,221 stores. By January 1, 1961, the total number of single outlet grocery stores was 3,818 and the number of multiple outlet grocery stores was 923 for a total of 4,741. By January 1, 1963, the number of single outlet grocery stores was 3,590 and the number of multiple outlet grocery stores was 958 for a total of 4,548.

[fol. 1456] 9. Plaintiff's Exhibits 33 and 34 demonstrate, in table and graph form, the number of single outlet grocery stores and the number of multiple outlet grocery stores (defined as concerns filing consolidated returns for two or more stores) in Los Angeles and Orange Counties for each of the years 1950 through 1961. Plaintiff's Exhibit 35 shows the number of single outlet grocery stores and the number of multiple outlet grocery stores for the period of January 1, 1961 to January 1, 1963. A breakdown of single outlet grocery stores and multiple outlet grocery stores was not made by the State Board of Equalization during the course of its regular tabulations for the years 1953, 1954, 1955, and 1956.

10. Plaintiff's Exhibits 33 and 34 also reflect the population of the two-county area as of January 1 for each year from 1950 until 1961. Since the population census is taken by the United States Department of Commerce only every 10 years, we have used published population estimates of the State Department of Finance for intercensal years.

11. Plaintiff's Exhibit 36 reflects the net change in the total number of permits to operate a grocery store in the Los Angeles Metropolitan Area in 1960. As reflected in 36, the issuance of a permit to operate a new store would be reflected as an opening, and a discontinuance of a permit would be classified as a closing. In some instances, a closed store might be reopened very shortly or even simultaneously [fol. 1457] with its closing and there would be both a closing and an opening for the same store. It is also possible, in some instances, that a closing would not be promptly reported and there would be a time lag before we would reflects the change. The net change, in any event, very closely approximates the total annual movement in the number of stores.

12. Plaintiff's Exhibit 37 shows the distribution of new permits for grocery stores in the area in 1960, distributed by gross sales.

13. Plaintiff's Exhibits 38 through 42 show the distribution of grocery stores which obtained permits in 1960 and discontinued their permits by November 15, 1961, grouping them in categories to show gross sales, number of stores, percentages, and chain groupings. As indicated in paragraph 11, some of the stores reflected as discontinued permits may have been reopened or taken over by another firm, in which case they would be shown as new permits as well as discontinuances.

14. Plaintiff's Exhibit 43 shows the estimated annual sales of grocery stores opened in the Los Angeles Metropolitan Area in 1960, expressed in thousands of dollars and showing percentage distribution among chain groupings.

15. Plaintiff's Exhibits 33 through 43 all consist of information collected and compiled by me or under my supervision. These exhibits show that single store outlets have been declining in numerical count and that multiple outlet stores, particularly those controlled by the large chains, [fol. 1458] account for the bulk of the business done under newly obtained permits. They also show that there is a very high percentage of discontinuance of new permits by small, single store operators and a relatively small percentage of such discontinuances by the large chains.

/s/ John B. Marshall.

[fol. 1459] Deposition of John B. Marshall

Be It Remembered that, pursuant to stipulation, and on Wednesday, May 29, 1963, commencing at the hour of 1:30 P.M. thereof, in the Grand Jury Room, Room 2203, Federal Building and United States Court House, 650 Capitol Avenue, Sacramento, California, before me, Clarence F. Wright, a Notary Public in and for the County of Sacramento, State of California, and an Official Reporter of the United States District Court, personally appeared John B. Marshall, called as a witness by the Defendants, and the said witness being by me first duly sworn, was thereupon examined and interrogated as is hereinafter set forth.

It was stipulated and agreed that this deposition need not be signed, and it may be used at the trial of said action as though signed by said witness.

JOHN B. MARSHALL, called as a witness by the Defendants, having been duly sworn, testified as follows:

The Reporter: Your name, please?
The Witness: John B. Marshall.
The Reporter: Your address?
The Witness: 786 Fifth Avenue, Sacramento, California.

[fol. 1460] Direct examination.

By Mr. Vaughn:

Q. And that is in Sacramento, is it not, sir?
A. Sacramento 18, California.

Q. Mr. Marshall, what is your business or occupation?
A. I am Senior Statistician in charge of Research Statistics for the State Board of Equalization.

Q. And you have prepared an affidavit and I assume that you have signed an affidavit which you supplied to counsel for the government in connection with this lawsuit, is that correct?
A. Yes, sir.

Mr. Vaughn: Do you have a copy of the affidavit, Mr. Coyle, with all of the new tables in it?
Mr. Coyle: I have a copy of the affidavit.
Mr. Vaughn: Would you show it to the witness.
Mr. Coyle: I think he has a copy.
Mr. Vaughn: All right, fine, if you will take that out.

Q. Mr. Marshall, attached to your affidavit are various charts and tables which, among other things, show the number of grocery stores in Los Angeles and Orange Counties during the various years commencing with 1950 to 1963, and also charts which show the opening and closing of grocery stores in Los Angeles and Orange Counties, is that not correct?
[fol. 1461] A. That is correct.

Q. And I take it that the information that you have there was compiled by you personally?
A. It was either compiled by me personally or under my direct supervision.

Q. And it is taken from the records of the Board of Equalization of the State of California, is that correct?

A. That is correct, sir.

Q. That was your sole source of information, is that right?

A. That is not entirely right. All of the statistics with respect to the accounts licensed by the Board were taken from Board records. The information with respect to the population was taken from the records of the State Department of Finance.

Q. Aside from the population figures, then everything else was taken from the records of the Board of Equalization, is that correct?

A. Taken from the records of the Board of Equalization or derived from the records of the Board of Equalization.

Q. I see. Now for the purposes of those statistics, how do you define a grocery store?

A. We define a grocery story as a store whose principal gross receipts come from the sale of food products, but we would not include delicatessens, meat markets, poultry [fol. 1462] and dairy stores, stores that we define as "other food stores", that is, food stores other than grocery stores.

Q. All right. In classifying for purposes of the Board's records various establishments, you use a publication known as the Business Classifications Codes or Business Classification Codes, do you not?

A. That is correct.

Q. Code 33 is defined as grocery stores with type B liquor license, is that correct?

A. That is correct.

Q. That would permit them to sell beer and wine only, is that right?

A. That is correct.

Q. And Code 34 is defined as groceries with Type C liquor licenses, is that correct?

A. That is correct.

Q. That would permit them to sell any type of liquor?

A. That is correct.

Q. Now with respect to Codes 33 and 34, are they also grocery stores with or without meat as in the case of Code 20?

A. That is correct,—could be.

Q. Could be?

A. It is entirely a matter of individual concern to de-

[fol. 1463] cide whether they will run their meat market or lease it out on a concession basis, or, in fact, some of them may not have meat markets.

Q. And you have stated that any concern or any outlet whose principal receipts come from the sale of groceries is classified under one of these three code numbers, is that right?

A. That is correct.

Q. Now would you define what grocery stores are?

A. This is pretty largely what the man on the street would consider to be a grocery store. It is the common understanding. That is a place where one would buy bread, eggs, milk, canned goods, and in the case of supermarkets, sundries.

Q. And that could, under these classifications, include liquor, is that right?

A. If they had a "C" license it certainly would include liquor.

Q. And it would include all types of non-foods customarily sold in grocery stores, non-food items?

A. Yes. In fact, that is what the taxable portion of the receipts are, because food is exempt from taxes.

Q. Food is exempt from tax, so you would only tax drugs, sundries, health and beauty aids, magazines—I guess magazines are not taxable, are they?

A. Some are. Periodicals are not taxable, books are not [fol. 1464] taxable, so you could have a mixed situation.

Q. Now, grocery stores then do not include those types of stores listed under Code 21 in the Business Classification Codes, is that right?

A. This is what we attempt to do, yes.

Q. Now, for purposes of the statistics developed for this case you did not include any of the stores classified under Code 21, right?

A. Any stores that were classified as Code 21 were not included.

Q. Right. And that includes bakeries, dairy products stores, delicatessen stores, with or without liquor licenses, fresh fruits and vegetable stands, and stores, health food stores, meats and sea food stores, and retailers of non-carbonated bottled water, is that right?

A. This would be correct. If their principal gross receipts stemmed from the sales of the types of products that you enumerated, they would be classified in Business Class 21, and not included in the exhibits attached to this affidavit.

Q. Were food stores other than grocery stores at any time lumped together with grocery stores in the records of the Board?

A. Yes.

Q. When did any change in classification take place so [fol. 1465] they were excluded from grocery stores?

A. In 1948.

Q. In 1948?

A. Yes.

Q. And the Business Classification Codes indicate that it was published in December, 1948. Is that the first time that this difference appeared between Food Stores and Grocery Stores?

A. It is a matter of—we are outside of the period covered by anything in this.

Q. I realize that.

A. Actually we started reclassifying in June 1948.

Q. In June, 1948?

A. That is when we started reclassifying. I believe we had the job virtually completed by the end of 1948, but classification is a continuing process.

Q. Yes, of course.

A. And any time we find an account that is improperly classified we will properly classify it. But I would say we had virtually all of the non-grocery store food stores out of our 20, 33 and 34 classes by the end of 1948.

Q. Fine. Thank you, sir. Now on May 16, 1961 you sent a letter to me answering a request of mine, and I would like to show you a copy of that letter and ask you if you can identify it.

[fol. 1466] A. Yes, I sent you this letter.

Mr. Vaughn: I will ask that copy of letter of May 16, 1961 from Mr. Marshall to myself be marked as Marshall Exhibit 1 for identification in this deposition.

(Document referred to was marked Marshall's Exhibit No. 1 and is attached to this deposition.)

Mr. Vaughn:

Q. In the letter which has now been marked Marshall's Exhibit 1, sir, and in paragraph (c) at the bottom of page 1 you state that meat markets, poultry markets, delicatessens, produce markets or other specialty shops, such as Dairy Drive-ins, are not classified as grocery stores and have not been so classified since January 1, 1950, is that correct?

A. Yes.

Q. That is an error then, is it not? It should be January 1, 1949, isn't that right?

A. Well now, we started this re-classification as I stated before, in the middle of June, 1948, and we largely completed this work by the end of 1948, but the fact that I used in this paragraph January 1950 is an indication that I allowed myself an additional year in order to be sure that we had got practically all, if not all, of these other food stores of our grocery store classification. In dealing with something like 260,000 outlets, I submit that you don't straighten out 260,000 records with a temporary crew in [fol. 1467] a period of six months. I would not concede that this date should be January 1949. I am saying——

Q. You are being conservative?

A. I am being conservative, and I think it took us at least until January, 1950 before we had enough of these out of our hair so that we could say that beginning with the 1950 decade we were pretty well in business in terms of the classification structure that we set out to set up in 1948.

Q. And your prior testimony that it was completed by January 1, 1949 you now wish to amend?

A. For statistical purposes, trying to get out of the public as best we could and as rapidly as possible—the date of our Code Book is 1948, this book here, this is the book we used that you have before you, to bring about the reclassification, and I am reasonably confident that by January 1, 1950 we had gotten the food stores other than grocery stores pretty well culled out from our statistics.

Q. Fine. Thank you. I note that in the foreword,—I think it is the foreword to the Business Classification Codes, it appears to be a letter to Headquarters and Field Staff, Department of Business Taxes, from Mr. Harold L. Say,

indicating that the classifications as set forth in the Business Classification Codes were revised as of July 1, 1952 and again revised as of March 1, 1961.

A. Both of those are correct.

[fol. 1468] Q. Did any of those revisions affect in any way Codes 20, 21, 33 or 34?

A. They affected Code 20. We did not make the distinction between Grocery stores selling liquor and those not selling liquor in our original reclassification. This change was introduced in 1952. At that point we took our industry code 20 and made it into three codes or classes.

Q. 20, 33 and 34?

A. And this is when we identified those grocery stores that had "B" licenses and those that had "C" licenses and gave them specific codes. This was done for administrative purposes. We recognized it would be more profitable to operate a grocery store selling hard liquor, that is, one having a C license, than it would probably one of those smaller grocery stores that merely sells the usual items sold by grocery stores, and not having a license to sell any kind of liquor.

So actually this was simply a refinement of the grocery stores. We had identified all those grocery stores and put them in Code 20 as we started our reclassification in 1948.

In 1952 we created three classes out of Code 20.

Q. I see.

A. We didn't take any out of 20, for example, and put them into 21. We simply moved them from 20 and put them in 33 or 34, if they were selling liquor.

Q. Was the revision as of March 1, 1961 in any way [fol. 1469] related to Codes 20, 21, 33, or 34?

A. No, sir, had no bearing.

Q. All right, sir. I would like you to refer once again, if you will, to the document which Mr. Coyle has which has been marked Exhibit 1 in this deposition. How many other food stores were there in Los Angeles and Orange Counties in 1950?

A. 1173.

Q. How many were there in 1955?

A. 1081.

Q. How many were there in 1961?

A. 1288.

Q. Thank you. I take it that when you refer to the number of stores in a particular community in a year you are referring to the number of stores in that community or in those counties as of January 1 of that year, is that correct?

A. We are referring to the number of outstanding permits issued to people in a specific type of business.

Q. As of what date?

A. As of January 1 of the year shown.

Q. And this holds true throughout the statistics which are on the tables appended to your affidavit, is that correct?

A. Yes, this is an inventory, this is a physical inventory. [fol. 1470] Q. Yes. As long as we are working with this exhibit, this same letter which is Exhibit 1, I wish you would at the same time refer to Exhibit B-5 (34) to your affidavit, which I think is right in front of you. Now, as I understand it, Exhibit 1 to your affidavit—or Exhibit 1 to the deposition shows that there were 5789 outstanding permits in Los Angeles and Orange Counties for the year 1950.

A. I don't know what document you are referring to.

Q. You can use the exhibit.

A. This is the document you are referring to (indicating)?

Q. Yes.

A. Now, will you rephrase your question?

Q. Yes, sir. That shows that in Los Angeles and Orange Counties there were as of January 1, 1950, 5789 outstanding permits to grocery stores, is that correct?

Mr. Coyle: The document speaks for itself, I think, and it doesn't show that.

Mr. Vaughn: Well, I am not reading it correctly, then.

A. You are not, you are not reading it correctly.

Q. Would you read it for me. How many grocery stores, according to this document, were there as of January 1, 1950 in Los Angeles and Orange Counties?

A. 6221.

Q. Oh. Now you have told me what a grocery store is for the purpose of your statistics, how you define it. Now, [fol. 1471] how do you determine whether a particular establishment is a grocery store within that definition?

A. We have established procedures to attempt to classify

all permittees according to the Code Structure that has been established.

Q. Let me ask you this, if I may: Anyone wishing to sell goods retail to the public——

Mr. Coyle: I will object. I think maybe Mr. Marshall had not finished his answer to the prior question.

A. I hadn't.

Mr. Vaughn: Q. All right. I thought I would shorten it down a little bit by asking you some specific questions but if you would like to go ahead, go ahead.

A. Well, we have established procedures which we are confident of for achieving accurate coding. We have the person who is taking the application from the individual who seeks a permit inquire as to the nature of business that he is wanting to engage in. This person asks the necessary number of questions to make a determination. He enters the description of the business ascertained through the application for the permit on the application. He also signs the type of business Code. This is reviewed by a person responsible for the supervision of this individual's work at the local office level, and it is sent to headquarters and in time it is reviewed in headquarters in order to re- [fol. 1472] flect the information as reported on the tax return with the statement as to the nature of the business, because the tax return has a sizeable number of items for exemptions, reductions, and when you relate the statement on the application to the information furnished on the tax return you are in a position to make a pretty positive deduction or determination as to the nature of the business.

Sometimes we find that people have misstated the nature of their business, and through this review in headquarters we correct it.

Now we must go further than this. We audit about 40,000 sales tax accounts a year. When our auditors find that the classification, the business classification assigned to an account does not coincide with the nature of business as conducted at that particular premises or by that particular multiple outlet operation, he puts through he necessary form to bring about the change in the classification.

So this classifying of accounts, while we are faced with

doing it at the time the man is there, we have a continuing process to make sure that we maintain the integrity of our Code system. We eliminate any erroneous coding that stems from either misinformation furnished to us by the applicant at the time the application is taken,——

Q. You mean you have procedures designed to accomplish that end?

[fol. 1473] A. To work toward the best possible code structure and the best possible classification of accounts.

Q. When someone comes in to a local office of the Board of Equalization and says he wants a sales permit to sales tax permit, if that is what you call it, he is provided with a form S-400, is he not?

A. He is not provided the form, sir. We have someone——

Q. That fills it out for him?

A. —that fills it out for him, because I don't think we would get very far if we had to rely on every outsider to fill these forms, for us. There would be a number of them that would not be too legible. In other words, we have someone actually fill out the form for them.

Q. And the interview is conducted——

A. The interview is going on——

Q. Let me complete my question. An interview is conducted between a local representative of the Board and the applicant, on the basis of which the representative of the Board completes form S-400, is that right?

A. Yes.

Q. Now, in your affidavit you refer to form S-401. Is there any difference between Form S-400 and Form S-401? And I will refer you specifically to page 2, line 13, of your affidavit in this case.

A. I can now see why people object to these numbers, because to me numbers—you get so many of them, and they [fol. 1474] are being changed, that I would rather refer to these in terms of——

Q. I just want to be sure that the document that is now before you is the application which an applicant or which a local representative of the Board would fill out?

A. Well, this is another form, sir. This is a tax return. This is the application. (Exhibiting document to counsel.)

Q. S-401 is a tax return, is that correct?

A. A tax return, yes. This is where we pick up information with respect to gross sales.

Form 400, leaving out the subscripts and things which identify an application for sales tax or some other tax that the Board administers, this is the application which causes the permit to be issued. Thereafter tax returns are furnished to the taxpayers and the form for that purpose is S-401.

Q. I see. Item 30 on form S-400, which is otherwise entitled "Application for seller's permit and registration as a retailer and department of Employment registration as an employer"—item 30 on that form states, "Type or nature of business," and, in parentheses, "(If mixed, underscore principal type)." Now, I take it that in each case item 30 would be filled in by the local representative of the Board based on the interview he has with the applicant, is that [fol. 1475] right?

A. That is correct, sir.

Q. And if the man says, "I am going to operate a grocery store," he fills in "Grocery store," is that right, or would he fill in a code number?

A. No, he would fill in "Grocery store," and would make further inquiry, "Are you going to sell beer or wine?"

If so, he would put down "License B."

If he were going to sell hard liquor and has a hard liquor license, a "C" license, he would put "License C".

And if it is mixed, he would ask further questions to establish what would constitute his principal gross receipts, what he hopes would constitute his principal gross receipts, and then the person doing this will enter the type of business code in item 4 on the form.

Q. The local representative?

A. The person doing it. So this person knows he will have to conduct a sufficient interview with respect to the nature of business so they are capable of assigning the proper class of business in item 4. And this is what is reviewed at the local office level.

Q. I understand.

A. And ultimately this information is reviewed in headquarters with the tax returns.

Q. I didn't ask you about that. You are going beyond [fol. 1476] my question. We will move along a little faster

if you will just answer the question that I pose. I think we will get everything out before the afternoon is over.

Has this form been revised since 1950 in any way that would affect the inquiry made under item 30?

A. The format of item 30 has been changed, but what we are trying to get at and have been trying to get at ever since 1948 has not changed.

Q. I see.

A. There has been very little change in terms of the overall format, but we are always looking for ways and means of cutting down the cost of our job and improving the overall accuracy of the operation.

Q. But the item of item 30 has not been changed since 1950, so far as you know?

A. Not significantly. Not that it would alter the classification in any respect so far as this particular category is concerned.

Mr. Vaughn: I would like the reporter to mark this form S-400 which has previously been identified in the record as Marshall Exhibit 2 for identification in this deposition.

(Document referred to was marked Marshall Exhibit 2 and is appended to this deposition.)

[fol. 1477] Mr. Vaughn: Q. Referring again to your procedures, sir, when an applicant comes in to obtain a sales permit and this form is filled out, is it a fair statement to say that your field representatives or local office representatives are instructed that in general a business is to be classified according to the owner's concept of the type of enterprise he will operate and not according to the principal line of taxable commodities, as was the case prior to January 1, 1949?

A. That is correct.

Q. Now, let me ask you for some specific examples: Suppose a man came in and said—an applicant came in to one of your local offices and said, "I intend to run a retail establishment where 51 per cent of my business will be in produce items and 49 per cent will be in general run-of-the-mine grocery items." Under what Code would that be classified?

A. Grocery store.

Q. Despite the fact that 51 per cent of his receipts would come from produce?

A. Despite the fact that 51 per cent of his receipts would come from produce.

Q. I have a difficult time reconciling that with the description between Code 20 and Code 21.

A. That is very easy to reconcile, sir. After all, a [fol. 1478] grocery store ordinarily handles produce, so you wouldn't separate on that basis. He has a grocery store. The fact that more than half of his business comes from produce does not alter the fact that he is a grocery store. Grocery stores can sell meat, they can sell produce. He would clearly be a grocery store. Furthermore, sir, if I might add, I don't think anyone would come in and tell us that——

Q. No, I am putting a hypothetical question to you so I can understand your system of classification. Suppose the applicant said, "I expect to run a meat market where 51 per cent of my products will be meat items and 49 per cent of them will be run-of-the-line grocery items," how would he be classified?

A. He would be classified as a grocery store for the same reason I just gave you.

Q. Suppose he said, "75 per cent of my products sold will be meat and 25, I will have some grocery items on hand, too, staples, bread, meat, and the like?"

A. He would be a grocery store for the same reason I cited.

Q. Suppose he says, "90 per cent of my products that I sell will be meat, and 10 per cent will be——"

A. I don't know where you are trying to push me on this, sir.

Q. I am not trying to push you.

[fol. 1479] A. He would come in—if he thought he was running a meat market, ordinarily a meat market will not be running a grocery store. Ordinarily you either have a grocery store without meat or you have a grocery store with meat, and you have two situations in the latter case. The meat department is operated by the grocery store, in which case it is a grocery store. If the meat market is leased to a concessionnaire, it is a separate business, separately licensed, the meat market would be classified as a

meat market, 21, and the grocery end would be classified as a grocery store.

Q. Suppose he said, "51 per cent of my gross receipts are going to be liquor and 49 per cent grocery items," how would he be classified?

A. A grocery store.

Q. And if he said 75 percent liquor and 25 per cent groceries?

A. It would be a package—no, it would still be a grocery store.

Q. How about 90 per cent liquor and 10 per cent grocery items?

A. If he indicated he was going to run a package liquor store it would be a package liquor store. If he indicated he was going to run a grocery store it would be a grocery store.

Q. You wouldn't inquire as to what percentage of his [fol. 1480] gross receipts would come from liquor or groceries, is that right?

A. That is right. It is like taking a department store and trying to figure out what percentage is being done in each department. We are not interested in what percentage is done in each department of the department store. A department store is a department store. Generally speaking a grocery store is a grocery store. A grocery store handles, can handle—a usual, commonly accepted grocery store, can handle liquor. He can handle meat, he can handle produce. But that is a grocery store. The fact that a meat market is handled by a concessionnaire makes the meat market a meat market. The rest of the business would be a grocery store.

But if a man running a package liquor store—and generally speaking they are running one or the other—it is not nearly as difficult as these hypothetical questions would lead one to believe. If a man is running a package liquor store and he has a small amount of coffee or orange juice, hors d'ouvres, or bread, convenience items to take care of the person that comes in for a bottle after ten o'clock, that doesn't make him a grocery store. He is a package liquor store.

Q. I thought you just told me that if 75 per cent of his

gross receipts were from liquor and 25 per cent from grocery items he would be a grocery store.

[fol. 1481] A. The nature of the man's business, he thinks he is running a liquor store, this is essentially what he is doing, he would be coded a liquor store. The fact that he runs a few groceries does not alter the situation.

Q. It depends on what he thinks he is doing?

A. It depends on what he thinks he is doing, yes. This is what is stated in here.

Q. Right. Well, let's analyze that again, sir. If you will turn to page 2 of your affidavit, line 26.

A. Page 2 of what?

Q. Line 26 of your affidavit, where you state, "It is part of our regular procedure to classify retail establishments according to their principal type of business as measured by gross receipts." Isn't it correct that the classification is by principal type of business as measured by what the applicant says he is going to do, what sort of concern he is going to run?

A. I think that this is a construction—or language that we have used over the years, which our people understand, and when we speak about principal gross receipts we are speaking about the principal gross receipts from all of the items that are commonly handled by an establishment that falls into a specific classification.

Q. Well, in other words, isn't it fair, isn't it your testimony, sir, that you classify these different establishments [fol. 1482] based upon what the man tells you he expects to do, what sort of store he expects to run, isn't that right?

A. Yes, that is right. We don't know what he is going to do. We have to rely upon what he tells us when he first applies for a permit.

Q. Right. Are you aware, sir, yourself, of developments in Los Angeles and Orange Counties in recent years where liquor stores have started to sell more and more grocery items?

A. I am aware of permittees moving into more and more lines so that, as I have facetiously stated, you can buy anything in a drug store but aspirin, or you can buy anything in a hardware store but a hammer. This is going on.

Q. Are you aware of the fact that liquor stores actually sell more bread than some supermarkets?

A. No, but unless the tax return would ultimately indicate that taxable sales were over 40 per cent of the gross we would become suspect that we have got something other than the way it is presently classified. We would ask for a check and our field people would tell us whether they think that this man still is properly classified. This is going on continually.

But, if I might interject, I don't think many liquor stores are getting to the point where their principal receipts are coming from the sales of grocery products, not when they [fol. 1483] are paying fifteen to thirty thousand dollars for a license.

Q. But there are a number of liquor stores, to your knowledge whose gross receipts are derived from grocery products to the extent of at least 25 per cent, are there not?

A. I haven't made a specific study of this, sir, no I don't think I should comment.

Mr. Coyle: I think for the sake of the record, I think the witness has been testifying that liquor is a grocery store item, that it is sold in grocery stores.

Mr. Vaughn: Q. Do you have a separate classification for liquor stores?

A. We do, if it is a liquor store, and most of these are pretty clean, most of these—their overwhelming gross receipts come from the sale of package liquor.

Q. Suppose an applicant came to you and said that he was going to sell bakery products in the main and he would also have grocery items?

Mr. Coyle: I think we are making a distinction. Bakery products are grocery items.

Mr. Vaughn: Mr.Coyle, I will refer you to Code 20 of the Business Classification Codes, which purports to separately list under the category "Food stores", bakeries.

A. Code 21, Bakeries?

Mr. Vaughn: Q. Code 21?

[fol. 1484] A. Code 21, Bakeries, and I am sure you can picture a bakery. These generally bake their own bread, cakes, and a bakery is a bakery, and the fact—I haven't seen one, but if a bakery did run a few cans of peaches or some

other canned food it would not make it a grocery store, it would continue to be a bakery. I think if you will check the book you will see that we also suggest that they give considerable weight to the name of the establishment. Generally speaking business people like to advertise what they are doing, and if they call themselves a bakery, they almost invariably are a bakery.

Q. And if they call themselves a grocery story they almost invariably——

A. They are almost invariably a grocery store. I don't think we have much of a problem in classifying, not merely as big a problem as some of these places might indicate.

Q. Suppose an applicant came to you, your local people, and said "I want to run a business house under one roof. I am going to sell appliances, soft goods, and I am also going to have a supermarket in my discount house, and my supermarket is going to constitute less than 50 per cent of my gross receipts. My main item will be appliances." How would you classify that establishment?

A. I would have to have more information, sir.

Q. What more?

A. I would have to know whether it was going to be under a lease operation——

[fol. 1485] Q. One operator, no concessions.

A. Well, you would code it—what per cent did you say the supermarket was going to operate?

Q. I said less than 50, but let's say 25.

A. O.K. He would probably be coded as a department store. He has departmentalized. We don't have many situations of this type, sir. They are generally operated on a lease basis. The concessionnaire in each establishment is coded according to the principal activity of his establishment. The average discount house will have anywhere from 10 to 20 different permits and will have anywhere from probably 10 to 15 different classes of business.

Q. You are aware, are you not, sir, that in the southern California area particularly there are a number of today's markets that began as produce stands, are you not?

A. Oh, yes, that is quite conceivable.

Q. And slowly as their business expanded they took in more items. When does the time come under your system

of classification when you change a produce stand to a grocery store?

A. Well, it came in 1948, it came again in 1952, it is on a continuous review. Under our audit program we have a system of audit where we cover 40,000 accounts a year.

Q. I don't think you understand my question. The man starts out selling 100 per cent produce items, fruits and [fol. 1486] vegetables.

A. I think I understood your question, sir.

Q. As time goes by the percentages——

A. He is not going to tell us except through his tax returns and the way we learn these is through our audit program, and that is the time we change it.

Q. Suppose his produce stand fully develops into what we might call a grocery store and he has more and more grocery products, but adds no non-food products. How would that be reflected on his tax return?

A. By the relationship of taxes to the gross sales.

Q. You mean they would be getting larger?

A. Yes, as his business keeps getting larger, and the larger businesses are the ones that are being audited, and it is during the audit that we learn that an account is not properly classified.

Q. It is the larger businesses that are being audited?

A. Yes.

Q. And in retail establishments, do you have any limit in annual sales below which you do not audit?

A. Absolutely not, because we do believe that we must police the entire system. We do police audits in all classes of business.

Let me explain it to make it clear to you. You realize that in an audit operation you have two bases for auditing: [fol. 1487] You audit for profit. Ordinarily we direct our audit resources to identifying the greatest amount of misreported tax liabilities. We hope to pick up money for the state through our audit program. But then we also have audits for police purposes. We would like the taxpayers to know that lightning can strike and we will do some auditing in all classes of business.

Q. What percentages of your audits of grocery stores are reserved to stores that do a million dollars a year in sales or more?

A. I imagine we audit those a hundred per cent, sir.

Q. A hundred per cent?

A. Yes.

Q. What percentage of those below a million dollars a year in sales do you audit?

A. We probably audit somewhere between two and three per cent.

Q. Let's go back to our produce stand. Are fruits and vegetables taxable items?

A. No.

Q. Are package groceries taxable items?

A. No.

Q. Are canned goods taxable items? When I say "canned" I mean canned food items,—are they taxable?

A. Generally, no.

[fol. 1488] Q. If a man's business were to change from 100 per cent produce sales to 50 per cent produce and 50 per cent non-taxable grocery items, how would his tax return reflect any change in his business?

A. It wouldn't except, sir, that his gross would be greater. If your question is he is continuing to sell about the same amount of produce, but he is expanding a little bit and now selling about an equal amount of canned goods, his gross would be double, wouldn't it?

Q. All right, let's assume that it is.

A. You see, they report gross to us.

Q. Yes, I realize that.

A. But we reflect in our tabulations gross as well as taxable.

Q. So how would that give you a clue as to the change of the character of his business, the fact that the sales had doubled?

A. It wouldn't, except that it could put him in a different cell because of his gross being larger, he is now a larger store, and he is taking 100 per cent deductible, we would probably want to take a look.

Q. I see. Now, I take it, though, that the amount of sales of a particular establishment has no bearing on whether he is classified as a grocery store or any other type of store?

[fol. 1489] A. None whatever, sir. It doesn't matter how small the business is or how large, it still is a question of

what is the principal activity at the place of business or by a concern.

Q. Suppose you had a trailer half a mile off of the main road on a dirt highway, whose total inventory amounted to about sixty dollars and whose daily sales amounted to about twelve dollars, but they were all grocery items. That would be classified as a grocery store, isn't that correct?

A. Yes.

Q. And grocery sales out of a home would be classified as a grocery store, isn't that correct?

A. It would be if this were the principal gross receipts. I guess you have brought that one back in.

Q. If you will turn, sir, to Exhibit 5 of your affidavit.

A. Yes, sir.

Q. In that exhibit and in others which are attached to your affidavit you differentiate between multiple outlet and single outlet concerns. I take it that a single outlet concern is an entity, a legal entity, such as a person, corporation or partnership which operates one retail outlet, is that right?

A. Operates one retail outlet and reports for that outlet on a regular tax return.

[fol. 1490] Let me qualify this by saying that he may operate two, three, or four outlets. As long as he reports for each outlet on a separate return he would be classified as a single outlet concern.

Q. He would be classified as two single outlets?

A. Yes, two, three or four. All of our statistics come as a by-product of tax accounting, and as long as a taxpayer reports all of his business for a particular location on a separate tax return he is classified in our statistics as a single outlet concern, even though in fact he may be buying for three, four or five, or even more stores.

Q. And a multiple outlet concern is a single legal entity which operates two or more retail outlets and reports to you on a consolidated return, is that correct?

A. That is correct.

Q. Now when a man who owns one retail grocery store in Los Angeles County opens up his second and chooses to report to you on a consolidated return for the two stores, this would be equivalent to the loss of one single outlet and the addition of two multiple outlet concerns, is that correct?

A. That is correct.

Q. And now your statistics developed for this case——

Mr. Coyle: I wonder if maybe the witness didn't understand the question. It would be the equivalent of a loss of two single outlets.

[fol. 1491] Mr. Vaughn: Not by my lights.

A. It would be the loss of——

Q. As soon as he opens up the second store——

Mr. Coyle: Oh.

Mr. Vaughn: Q. —and immediately commences reporting on a consolidated basis, you lose one single outlet concern and you add two multiple outlet concerns outlets.

Mr. Coyle: That is assuming he does not acquire the second store that he opens.

A. Yes, there is this qualification.

Mr. Vaughn: Q. Suppose he acquires——

A. For example, if he buys——

Q. If he acquires another outlet run by somebody who is reporting as a single outlet, then that results in the loss of two single outlets, and a gain of two multiple outlets, is that correct?

A. That is correct.

Q. The statistics which are reflected on Exhibit B-5 (34) show generally a decline in the number of single outlets grocery stores operated in Los Angeles and Orange Counties from the year 1950 to 1961. Can you tell me, sir, what percentage or what portion of that decline is attributable to the phenomenon which I have just described?

A. Well, obviously it would be very small, because the number of increased outlets in multiple outlet stores has [fol. 1492] not been nearly as great as the decrease in the single outlet concerns. Let me make this clear: You have 886 multiple outlet concerns in 1950. In 1961 you have gone up to 923.

Q. Right.

A. Now this is a gain of 67. But you had a drop in single outlet concerns during that period of 1547. So it becomes quite apparent that 1547 have disappeared. Even if we assumed, and certainly you wouldn't be justified in doing so, but even if you did assume that every time this phenomenon

that you described happened, every time that there was another two multiple oulets there were two fewer single outlet concerns, you realize that we only had about 67 to work with. It is pretty hard.

Q. 67 new multiple outlets concerns?

A. Net change.

Q. Net change, right. You are acquainted with the Safeway Stores, are you not?

A. Yes.

Q. Are you acquainted with the fact that their number of stores in Los Angeles and Orange Counties since 1950 have declined?

A. I am not familiar with that. I cannot speak specifically as to that. I am certainly familiar with Safeway Stores, but I can't tell you whether they have increased or declined, because I haven't made any research into this. I [fol. 1493] can tell you how many stores they have today, but I don't know how many they had then.

Q. All right. You are aware, are you not, that the stores in the Los Angeles Metropolitan area are and have been, let's say, since the war, become larger and fewer in number?

A. I don't think there is much doubt about that, sir.

Q. Yes, of course. And did you know that Safeway in the 1930's had in excess of a thousand stores in Los Angeles and Orange Counties?

A. Say that again, please, sir.

Q. In the 1930's Safeway had in excess of 1000 stores in the Los Angeles metropolitan area.

A. I wouldn't know. That is prior to my going to work for the Board of Equalization, and I am in northern California.

Q. You wouldn't know that?

A. I wouldn't know that.

Q. Do you know that most of those stores were very small?

Mr. Coyle: He just said he didn't know.

A. I just don't know. In 1950 I was going to school and I wasn't thinking about these things, and in 1935 to 1945 I was working—as my affidavit shows, I was working with employment statistics, not sales statistics.

Q. The point I am trying to get at, sir, is not really

[fol. 1494] complicated and it is that it is possible, is it not, statistically, that the larger chains in the Los Angeles metropolitan area have, or some of them have, had experienced a decline in the number of stores of the last decade?

A. Well, some of the individual chains might have. Again, this is something I haven't studied, but in terms of the number of multiple outlet stores in the last decade in the Los Angeles metropolitan area they have gone up by the number that I have cited. In 1950 there were 856 and in 1961 there were 923.

Q. You don't know how many chain stores, that is, stores operated by multiple outlet concerns as we have defined that, have been closed since 1950, do you?

A. No. All of our statistics will show in terms of anything that we have published is a net change that has taken place.

Q. Right.

A. Everything that we have presented here is the net change, as they are inventory figures. Now with respect to the present situation, I can tell you what per cent of the chain stores——

Q. I think that goes beyond my question.

A. O.K.

Q. I am trying to lead to a particular thing here. What I am trying to lead to is this: Since you do not know [fol. 1495] how many multiple outlet concerns have been closed since 1950 and you can only tell me the net change, the fact that multiple outlet concerns have increased on a net gain basis at a slight rate over the last ten years, and single outlet concerns have decreased at a greater rate over the last ten years——

A. Did you say decreased?

Q. Decreased, does not necessarily mean that there have been a few single store operators that have added a store and have thereafter reported to you on a consolidated basis, is that right?

A. I am not following you.

Q. All right. You previously said that it is obvious from the statistics appearing in Exhibit B-5 (34) that there have been few single outlet concerns which have acquired or built a second store and have become multiple outlet concerns, because the number of multiple outlet concerns or

the number of multiple outlets have not increased as rapidly as the number of single outlet concerns has decreased, isn't that what you said?

A. Well, let me try—I think I know what you are driving at, and I am going to try to answer it.

Q. All right, sir.

A. The fact that 78 per cent, more than 78 percent of the multiple outlet stores in the Los Angeles metropolitan [fol. 1496] area are operated by chain stores that have more than ten outlets would lead me to conclude that what you are driving at I can't support. I mean I can't go along with the conclusion you are trying to draw.

Q. You are not answering my question.

A. Well, I am trying.

Q. You made the statement that table B-5 (34) tells you that there have been few single store operators who have added another store and hence become multiple outlet concerns because single outlet store operators have experienced a decrease in number while multiple outlets have increased at a lesser rate from 1950 to 1961, is that correct?

A. I submit the answer I gave you is pretty germane to what you are trying to get at, and that is that there are 23——

Q. I will withdraw the question and I will ask you this question: What percentage of the decrease in the number of single store operators in Los Angeles and Orange Counties from 1950 to 1961 is attributable to single store operators adding another store and reporting to you on a consolidated basis?

A. I cannot give you the precise per cent, but it is very, very small, for the reason I tried to give you in answering your previous question.

Q. All right. Now what is that reason?

[fol. 1497] A. Well, the fact that 23 grocery chains in the Los Angeles metropolitan area account for 79.2 per cent of the multiple outlet grocery stores in the Los Angeles metropolitan area indicates that there are not enough stores left to have any substantial—now I have cut this on 10 or more; if I cut it on five— I don't know at what point you consider a chain a chain of any consequence. You are apparently driving at this question of a two store chain. I don't think we have very many of these. In fact——

Q. How many do we have?

A. I don't know.

Q. You don't know?

A. I haven't been asked to check this, but I can say this, that we have very few two outlet chains.

Q. What do you call "very few," less than ten?

A. Oh, I can't——

Q. Well, you have something in mind, Mr. Marshall. Less than 50?

A. Well, I can start working from these numbers. You see, I like to be very specific——

Q. So do I.

A. —and I have accounted for 759 of this 923. That leaves only 164 to account for those chain stores that have nine, eight, seven, six, five, four, three and two stores. There just isn't much room.

[fol. 1498] Q. You say you find 23 chains with 10 or more stores?

A. In the Los Angeles metropolitan area, yes, sir.

Q. And I will repeat the question: What do you regard as "very few?" We are being precise.

A. Well, I would want to count them.

Mr. Coyle: I think we should make clear on the record——

A. They can be counted.

Mr. Coyle: Mr. Marshall compiled certain statistics for us on a reimbursable basis and we made a request they compile those statistics, just as I assume that you made a request of him, but Mr. Marshall hasn't volunteered any information to us, and if we didn't request the information he didn't compile it, just as he didn't compile it for you. So these things that he might compile were not compiled because we didn't request it, because we didn't think of making the request.

Mr. Vaughn: Well, I haven't any doubt about that, but my question was just designed to determine what Mr. Marshall meant in his testimony when he said "very few"?

A. Well, I would like to count these. I mean if it is important——

Q. You have made no such count?

A. I have made no such count, sir.

Q. I am sorry.

A. I could tell you what it would involve to make such count. It would mean going through 40——

[fol. 1499] Q. I didn't ask you that, sir.

A. O.K., pardon me. I am trying to give you as much information as I can.

Q. Right.

(At this point a recess was taken.)

Mr. Vaughn: Q. Sir, would you refer to Exhibit B-6 (36) to your affidavit, and I would like to compare that for a moment with Exhibit B-7A (37) and with specific reference to the number of openings by single outlets in——

A. Will you give me your later page, I didn't catch that.

Q. B-7A (37). I believe that throughout the exhibits referred to under the captions B-7 (37 to 43) and some letter that you have referred to 127 openings by single outlets in 1960, and in Exhibit B-6 (36) you refer to 128? I assume that that is a typographical error, sir, in Exhibit B-6 (36).

A. I couldn't say what that is.

Q. The two figures should be the same, should they not, sir?

A. Well, I believe that the two figures should be the same, yes. I cannot account for the discrepancy of the one.

Q. In any event, it is correct, is it not, that—well, strike that, I am sorry. I would like to talk about openings and closing for a moment as they are reflected in your [fol. 1500] Exhibits B-6 (36), B-7A (37) through B-7F (42).

I take it that whenever an applicant comes in for a new permit that is regarded for purposes of these statistics as an opening, is that right?

A. Yes.

Q. And whenever a new legal entity, an individual or partnership, or corporation or any other type of entity, commences operation of a new or existing store, a new permit is required, is that right?

A. Whenever there is a change of ownership a new permit is required.

Q. All right.

A. This means that one is closed and one is opened, and there is no change, and the figures on table B-6 (36) deal with net change.

A. That is correct.

Q. Now if you open up a brand new store, that is an opening only, right?

A. Yes.

Q. And if, for example, a store was condemned so that a freeway could be placed on the property formerly occupied by the store, that would be a closing only, is that correct?

A. That is correct, sir.

Q. If there is a sale of a store from one grocer to [fol. 1501] another, that is both an opening and a closing, correct?

A. That is correct.

Q. If a sole proprietor of a store were to incorporate, to become a corporation, that would be both an opening and a closing, right?

A. Yes. However, where we were able to identify those transactions, they were wash transactions that did not get into these statistics.

Q. And they are not there as openings or closings?

A. That is correct. But that is only where these could be identified and an effort was made to identify these, but unless the person affected, most directly affected by the transaction reported these things to us we would not be in a position to bring about a wash transaction.

Q. You did not know, then, what percentage of the 128 or 7, let's say 127 openings of single outlets were openings of brand new stores, or just a change in the entity operating the store?

A. No.

Q. You do not?

A. No. The thing is there were more openings, and there were more closings than what is reported here. The wash transactions have been omitted from this.

Q. And so that I understand you further, if a partnership were to incorporate, you would have——

A. A wash transaction.

[fol. 1502] Q. And you would try and find out that information and you would not include it in this table B-6 (36) or any of the subsequent tables concerning openings and closings?

A. That is right.

Q. But you do not know what percentage of these openings or closings are represented by such transactions?

A. That is right.

Mr. Coyle: I think he testified too, just to clarify our understanding, that he does not know all the wash transactions. There may have been wash transactions that were not reported to him, because it would be up to the parties to report if there was a wash transaction?

A. Right.

Mr. Vaughn: Q. And I take it the same would be true if a corporation changed its name, an opening and a closing, you would not include them if you knew that fact?

A. This is predicated on the information called to our attention. No attempt is made by us to check into the record beyond the information that is called to our attention.

Q. Did you try also to exclude as a wash the instance where one grocery would sell his store to another grocer?

A. This is what I indicated, when they tell us this.

Q. Or when a partner dies or a partner is added, you also try to eliminate those, is that right?

A. Yes.

[fol. 1503] Q. What if an individual closed his store at a particular location and opened one up directly across the street, would that be an opening and a closing in these statistics?

A. It would be an opening and a closing or it could be a wash transaction.

Q. If you knew that factor would you——

A. If they had reported it to us we would have treated it as a wash transaction. If it wasn't reported to us then it would show up in these figures.

Q. Is it possible that you could have known—well, let me ask you this: Let me show you what I think is one of your forms. This is a form entitled, "State Board of Equalization, Department of Business Taxes, Sales and Use Tax, Request for Close-out of Account." Is this a form which you customarily use to close out accounts?

A. Always.

Q. Always.
A. This is always used.

Mr. Vaughn: I ask the reporter to mark the request for close-out of account form, which is numbered, by the way, S-406, as Marshall Exhibit 3 for identification in this deposition.

(Document referred to was marked Marshall Exhibit 3.)

Mr. Vaughn: Q. I note that on this form there is a box entitled, "Reason for close-out," and there are four choices:

[fol. 1504] "Did not operate; business discontinued; change in ownership, change in business location."

Now is it mandatory that one of these blocks be checked in every instance of close-out?

A. The instructions call for one block to be checked in every case. I don't believe this instruction is followed out absolutely rigidly in 100 per cent of the cases, but it is checked in the overwhelming majority of cases.

Q. Is it correct that you determine the information which you fill in the reason for close-out block on form S-406 in essentially three ways: First, you may be advised by the owner of the business for the reason for the termination of the permit at the particular location—is that right?

A. I didn't get the nature of the question. You started "In three ways".

Q. Well, one of the ways that you find out the information which you would fill in the reason for close-out block is that you were advised by the owner of the business that he was terminating his business for one reason or another?

A. The taxpayer comes into the office pretty much as he did when he took out his obligation. Now he is notifying us that he is discontinuing his business and he may want to get his deposit back if he has a cash deposit on file and in [fol. 1505] closing it out our people are interested in learning as much about the close-out as possible so that they can determine the liability of the successor to get a permit, so this is another fairly vital bit of information.

Q. Yes. Another way you determine the reason for close-out is that if a successor comes in and asks for a permit, is that correct?

A. Yes, and then we go to the predecessor and see that we get rid of his——

Q. Tax liability, if any?

A. Yes.

Q. Another way you find this out, if nobody comes in you may have a tax return filed for a particular entity in one year and you investigate, is that right?

A. We could have another possibility, and that is that he does file a tax return.

Q. Indicating——

A. Indicating no business, nothing.

Q. I see.

A. He doesn't tell us he is out of business and he files his tax return.

Q. Just says he owes nothing?

A. He says he owes nothing, and until we pick up an audit or something he still has an outstanding permit. It is not worth anything, but he has it. This is very rare, but I mean we have it.

[fol. 1506] Q. Sir, I have another letter which you were kind enough to send to us. You sent it to Mr. William W. Aslup of O'Melveny & Myers, under date of September 7, 1961. Do you recognize that as a copy of a letter you did send to Mr. Aslup?

A. I do.

Mr. Vaughn: Mr. Reporter, I will ask you to mark that as Marshall Exhibit 4 for identification in this deposition.

(Letter referred to marked Marshall Exhibit No. 4.)

Mr. Vaughn: Q. Before we get to that letter, sir, would it be fair to say that in Exhibit B-6 (36) and in the exhibits B-7A (37) through F (42 of your affidavit, that the words "Opening and closing" more accurately refer to and opening and closing of your files rather than the opening and closing of stores?

Mr. Coyle: You are assuming something that is not on the exhibits. The exhibits say "Grocery stores obtaining permits."

A. That is strictly an inventory operation.

Mr. Vaughn: Q. Well now, let's just talk about Exhibit B-6 (36).

A. O.K., that is better.

Q. The openings and closings there are really more properly the opening and closing of your files than the opening and closing of grocery stores?

[fol. 1507] A. They are the issuance of a permit to operate at a particular location by the particular local entity and the closing of—or the withdrawal of the permit issued to a particular entity to operate at a particular location.

Q. But just so somebody reading this deposition and these exhibits will understand, you do not purport to say that there were 119 new stores opened by multiple outlet concerns in 1960, isn't that right?

Mr. Coyle: Also, to make the deposition clear——

Mr. Vaughn: Well, can he answer my question?

Mr. Coyle: I don't think you accurately stated what the witness has testified. The witness has testified that this Exhibit B-6 (36) was prepared for the purpose of showing the net gain or the net loss, and the figure 119 does not indicate that 119 new permits were issued, it indicates that 119 permits were issued in situations which he did not know the situations, and it was not a wash transaction.

Mr. Vaughn: You say every one of those 119 openings by multiple outlet concerns were not a wash transaction, is that right?

A. I didn't say that, I didn't say that.

Q. Well then, my question, which I will repeat, is that you did not mean to say, did you, that there were 119 openings of new stores by multiple outlet concerns, isn't that right?

[fol. 1508] A. There were 119 permits issued to multiple outlet concerns to operate at particular locations that did not represent, according to our records, wash transactions.

Q. But you know there are wash transactions in that 119, do you not?

A. We tried to eliminate as many wash transactions as we could. It is a question of what was on the forms that were filed with us.

Q. And you know there are some wash transactions in there, do you not?

A. I don't know. I would have to go back and work over records. It involves another research project. I

couldn't say there were or weren't. I imagine there may be. I think it is certainly conceivable that there could be, because not everyone is reporting as comprehensively as would be necessary to make a flat positive statement that every one of these 119 were not wash transactions. There could have been one, two, or three wash transactions. I couldn't say.

Q. Now, if we may turn to the letter which has been identified as Exhibit 4 to this deposition. In that letter, sir, as I read it, and correct me if I am wrong, you have listed or stated that there were 939 grocery stores whose sales tax permits were closed out in 1960, is that correct?

A. That is correct. These included the wash trans- [fol. 1509] actions and that accounts for the difference in the figures.

Q. That accounts for the difference?

A. In the figures, surely.

Q. Now you say that 69 of those 939 stores had sales of under $10,000 a year, is that correct?

A. Yes.

Q. And you determine that, do you not, by taking the sales for the year, if it is available, and in the case where it is not available and you have sales for a given period you project any of those sales based upon the information available to you, is that correct?

A. That is what we did.

Q. So in all cases these are annual sales figures?

A. Yes, this is put on an annual basis, based on the gross sales reported to us for the period the man was in business.

[fol. 1510] Q. Do you have any way of knowing, based upon the information that you have collected, what portion, or in each of these categories of dollars, what number of them were wash transactions and which were not?

A. No.

Q. You do not. You don't know how many were just closed without a successor in any category?

A. No. You could get an approximation by relating the figures in the two sets. It would take a little time to do it, but it is possible, with the qualification that to the extent that there may be a few wash transactions that were not identified in the figures shown in Exhibit B-6 (36), but other than that you could go through this—you couldn't

pinpoint it as to the class of annual gross sales, but overall you could certainly get the figure. You have got the basis to do it.

Q. You have to make an assumption——

A. Where they fall, and of course this would be very rough, making the assumption as to where they fell.

Q. Wouldn't you imagine that you would find that the actual close-outs with successor were more predominant in those stores that had the lower sales?

A. Oh, I think this is almost a foregone conclusion. The man didn't have anything to sell. He had a white elephant on his hands. He couldn't make a go of it and he couldn't convince anyone else that they might find this a quote, [fol. 1511] "gold mine", unquote.

Q. That represents the reason for a great number of close-outs without successor, does it not?

A. People that can't make money in the grocery business go out of business, and unless they can convince someone else that they might make money they are going to close out without a successor.

Q. And generally speaking their store is not a desirable store?

Mr. Coyle: That is not what the witness said.

A. I am just reporting what the results of operations in this line of business have been as reflected by tax returns filed with us. It might help you——

Q. Go ahead.

A. You might wonder why there were 69 stores with annual gross sales under ten thousand, which you might believe is almost an impossible situation. Well, I imagine—I will just volunteer this—I imagine that when a man is going broke he may take a little time between where he has actually ceased to operate looking for someone, and this running of time is reflected in the tax return submitted to us.

Q. From the tax return submitted to you are you able to state what, generally speaking, a grocer is able to make by way of gross profit on his sales?

A. Absolutely not. Their gross profit or net loss. [fol. 1512] All we get is the total volume of business done and the amount of exemption and the tax that he owes us.

Q. If you will refer now, sir, to Exhibit B-5 (34) to your affidavit, do you make a count as of every January 1 to determine the number of grocery stores that there are in Los Angeles or Orange Counties, or in every county in the State?

A. That is correct.

Q. Do you do this by actually making a nose by nose count of the number of permits that you have in your files, or do you merely take—or do you take—I shouldn't say 'merely'—do you take the net change of openings and closings in a given year and subtract it from the prior years' total?

A. It is a physical inventory, it is absolutely a nose count. It comes off on a magnetic tape, and the magnetic tape is used to control account delinquencies, so it is a pretty solid figure.

Q. I see. Now, I would like next to show you a letter from you to me dated April 9, 1962 and ask you if you can identify it as a copy of a letter you sent to me.

A. This is a letter that I sent to you.

Q. Yes, sir.

Mr. Vaughn: I would like to have the reporter mark that letter as Marshall's Exhibit 5.

(Letter referred to marked Marshall Exhibit No. 5.)

Mr. Vaughn: Q. Now, sir, it is correct that I have [fol. 1513] requested you to supply me with the names and addresses of the 301 stores which closed according to your Exhibit B-6 (36) to your affidavit, is that right?

A. That is corect.

Q. In addition to which I asked you to supply me with the names and addresses of the 81 stores which were opened in 1960 but closed by November 15, 1961, according to your Exhibit B-7B (38) and other exhibits which reflect those figures, is that not correct?

A. That is correct.

Q. And you courteously went to the effort of gathering that information for us to the extent possible. I take it, however, that you were unable to find—of the 301 stores which closed in 1960 you were able to provide us with the names and addresses of only 214 of them——

A. That is correct.

Q. —is that correct?

A. I think if you counted the figures I gave you correctly that is correct. I could stop and count them.

Q. I think you better do that to be sure we have got——

Mr. Coyle: I think we can stipulate they probably counted them correctly.

Mr. Vaughn: Yes. I just did it right now.

A. Yes. O.K. Here they are (indicating).

Q. Yes. But you say in your letter, sir, that you [fol. 1514] supplied us with 38 multiple outlet concerns and 176 independent concerns, which add up to 214. Now the total we asked for, of course, was 301. Will you explain to me why you were unable to supply us with any more than 214?

A. Yes. The explanation for this is information that we were asked to compile for the Departmentalists was identified solely by account numbers. There is no reason for us to take the trouble and the time and effort of identifying the name and address of these closed out businesses.

Now had your request come in much earlier we could have gone back to our central files and established the names and addresses on these accounts, but there was a rather considerable delay from the time the information was compiled for the Justice Department and the time your request came in.

When an account is closed out and the taxpayer has paid us all of the money that he owes us, we destroy the records. We receive two million pieces of paper on sales taxes a year, and this would crowd you out of the building, so we have a regular program for the destruction of records, and these files are destroyed. We couldn't give you the information. All we had in our files were account numbers.

Q. You did have all the names and addresses for those and you supplied them to us for those which had opened in 1960 and closed by November 1961, because those obviously relate——

[fol. 1515] A. Yes, they were current enough so that we still had them. But when people go out of business and they don't owe us anything we lose all interest in them. This is the problem, we just didn't have them. We worked

hard and we did what we could to give you the information that you requested. This is as many as we could identify.

Q. In other words, when you compiled the information set forth in these exhibits for the Department of Justice concerning openings and closings, no matter in what year, you went not to the company's file, but to what, a card with the code number on it?

A. Well, let me try to describe it to you.

Q. Yes.

A. —if I can. First we went to a tab listing that gave us all of the close-outs month by month over this period of time, and we wrote down on a 3 by 5 card for each of these the account number, and then we took the information and went to our central files and abstracted the information that was needed to fulfill the request of the Justice Department, and we did not at that time—at that time we did not bother to take down the names and addresses of the taxpayer, because we were not asked for this. We simply abstracted the information with respect to the gross sales, and whether it was a wash transaction, so that we could go on with compiling answers that were put to us. Then when your request came in we had to [fol. 1516] go back to the central files to pick up the names and addresses.

Q. I see. And in some cases those central files had been destroyed?

A. By that time they had moved.

Q. And there is no way of duplicating that information?

A. No, it is gone.

Q. It's gone?

A. It's gone. Had you made your request earlier, at the time of their request, we would have been able to furnish you with all the names and addresses, because in every case we did have the necessary to tabulate the information that was shown in our tabulations that were furnished to the Department of Justice.

Q. In relation to the statistics that you have gathered showing the stores that opened in 1960 but which were closed by November 15, 1961, did you eliminate wash transactions in gathering those figures?

A. We attempted to, yes.

Q. The heading on these exhibits, though, refers to gro-

cery stores which obtained permits in 1960 and which either still retained their permits——

A. Which exhibit are we talking about, sir?

Q. Let's look at B-7E (41) and B-7F (42). Now that refers to grocery stores which obtained permits in 1960 [fol. 1517] and which either still retained their permits or had discontinued——

A. Just a moment. We are talking only about Exhibit B-7E (41)?

Q. And "F" (42).

A. Do you want to go—I think we can settle this first one.

Q. All right, go ahead.

A. I think it would be less confusing.

Q. Let me put my question to you so you will know what I am asking. That refers to grocery stores which obtained permits in 1960 and which still retained their permits as of November 15, 1961. Do you know how many of the permits obtained in 1960 were by reason of a successor business or change in identity of the——

A. No, this is the total number that obtained—this is all other people that obtained permits during this period, and that still had the permits on November 15, 1961.

Q. And in obtaining the permits, you don't know the reason for obtaining the permits?——

A. No.

Q. Whether it was one grocer selling to another, or a corporation changing its name, one partnership changing to a corporation, or whatever, is that right?

A. That is right.

Q. Now, with respect to Exhibit B-7F (42) where you referred to grocery stores obtaining permits in 1960 and [fol. 1518] discontinuing permits by November 15, 1961, you do not know the reason for this discontinuance in any case, I take it, or you do not reflect that in your statistics?

A. We don't reflect that in our statistics.

Q. And this could be a discontinuance of a permit because of a change of name of an entity which was operating at a particular location, is that correct?

A. The other part of it. These are permits that were

taken out during this period, and still in effect at the end of the period. So with respect to these permits——

Q. I am talking about B-7F (42), now, which I think refers to the discontinued permits, does it not?

A. I know, but it is only with respect to those that were acquired in 1960.

Q. That is right.

A. Now,——

Q. You take those where there was a new permit in 1960?

A. Yes.

Q. You have a stack of a hundred and whatever it is.

A. Yes.

Q. 246?

A. Right.

Q. You eliminate 81 from those just by seeing which permits were still in effect, is that right?

A. Yes.

[fol. 1519] Mr. Coyle: 81 are the permits which were discontinued.

A. Of that 246, 81 disappeared. It is another way of saying that one third of the ones that started it—one third of the grocery stores that started in business in January, 1960, or any time between that date and November 15, 1961, one third of them were gone by November 15, 1961. A very high rate of mortality.

Q. Let's say that "A" Company in 1960—in 1959 was operating a grocery store. It decided that it would change its name to "B" Company in 1960, which it did, and it came to you and got a new permit under the name of "B" Company. In 1961, before November 15, it decided again that it wanted to change its name again to "C" Company, so it came to you and it got a permit to operate under the name of "C" Company. Now is it not a fact that this would be reflected in the statistics set forth on Exhibit B-7F (42) as an opening in 1960 and a closing in 1961.

Mr. Coyle: That is not exactly what he testified.

Mr. Vaughn: That is just what he testified, Mr. Coyle.

Mr. Coyle: He testified that he surveyed those new openings in 1960 to determine whether or not from his records

they were wash transactions. A change in name would have been a wash transaction if indicated on the application.

Mr. Vaughn: I think the testimony stands for itself. [fol. 1520] But in any event, you made no attempt to weed out the wash transactions in determining the discontinuance of permits prior to November 15, 1961, with respect to stores that had obtained a permit in 1960, isn't that right?

A. Read it out of here. Let's go back. (Referring to document.) I think that 13 of my affidavit spells it out.

Q. Right. You just counted the new permits, for whatever reason obtained, that came into being in 1960 and then deducted from them those permits which has been—what is the word?

A. Discontinued.

Q. —discontinued for whatever reason, and came up with the figure 81 discontinued, isn't that right?

A. 81 discontinued.

Q. Right. Now, if you will refer to paragraph 11 of your affidavit and to the sentence beginning on line 11, as reflected in B-6 (36), the issuance of a permit to operate a new store would be reflected as an opening and a discontinuance of a permit would be classified as a closing. Now with respect to Exhibit B-6 (36) you did exactly the same thing, is that right?

A. I don't believe so. They are not the same, in that the openings are the same——

Q. Yes.

A. —and the closings in B-6 (36) represents all closings.

Q. You mean all discontinuances?

[fol. 1521] A. All discontinuances, rather than only those that came into business subsequent to January 1, 1960. And this is the distinction, the difference.

Q. All discontinuance of permits for whatever reasons?

A. In B-6 (36) we are talking about all discontinuances, and this was done in order to show the net loss that resulted. Where in Exhibit B-7F (42) we are dealing with the specific accounts that were opened on and after January 1, 1960 and on or before November 15, 1961.

Q. Right.

A. So they are quite different.

Q. The two tables are quite different, aren't they?

A. Yes, they are quite different.

Q. But the method used was the same in each instance? You would merely count up the number of permits for the given period of time, the new permits, for whatever reason they were opened, and then you would count up the number of closeouts or discontinuance of permits for the given period of time, for whatever reason the discontinuance took place?

A. Out wash transactions were eliminated from both of these tables, sir.

Q. From both of the tables?

A. Yes.

Q. You are then prepared to say that those 81 closings reflected on Exhibit B-7F (42) represent only those clos- [fol. 1522] ings which were without a successor, is that right?

A. Which we could identify as not having a successor. There are many opportunities where there is a grocery store in business on January 15th operated by "A" that is out of business by March 15th, that may be operating as a grocery store on April 1st. That does not necessarily mean that there was a successor. These are counted, one closed out on March 15th, one opened on April 1st. There can be a lot of this.

A man has a business, he can't make a go of it, he can't sell it, he is out of business, the store is vacant, someone else thinks they can make a go of this, and they may try a grocery store at that location and a permit is taken out. The fact that there is a grocery store operated at that location throughout much of this period does not indicate that there could not have been one or two close-outs, not wash transactions, but what we would call bona fide close-outs and bona fide reopenings.

Q. Take the stores that opened in 1960: How many of the permits issued for those stores were discontinued, for whatever reason, by November 15, 1961?

A. Wait a minute. Will you repeat the question, please? I am not sure of it.

Q. Take the stores opened in 1960.

A. All right.

Q. As to each of those they would have a new permit, [fol. 1523] is that right?

A. Yes.

Q. How many of those permits were discontinued, for whatever reason by November 15, 1961?

A. 81, which excludes, again, the wash transactions.

Q. I didn't ask you to exclude the wash transactions, I want you to include the wash transactions.

A. I can't answer that.

Q. You don't know.

A. I don't know.

Mr. Coyle: Which exhibit are you referring to?

A. I think he was referring to Exhibit B-7F (42), and there the statistics we gathered were with respect to the number of new permits that were obtained, new entities, and the number of those that were discontinued.

Q. Why didn't you say "Discontinued without a successor" in your heading? And why didn't you say it in your affidavit?

Mr. Coyle: Are you asking for his motives?

Mr. Vaughn: Q. Uh huh.

(Laughter.)

Mr. Vaughn: Q. Isn't it a fact that you don't know how many of those 81 discontinuances reflected on Exhibit B-7F (42) were without a successor?

A. These were without a successor in accordance with [fol. 1524] the information on our records, and I described pretty thoroughly how we get this information, and I would venture a guess that a very high percentage of these were without a successor because we attempted to get information with respect to successors.

Q. All right, sir. Now, I show you a series of pages. The first is marked "Table A" and consists of five pages, and the second is headed "Table A" and consists of three pages, which I will ask you to look at and see if you can identify it.

A. This is some information which you requested in your letter of——

Q. April 9, 1962?

A. July 20 of 1962.

Q. Right, and it was——

A. This is information that we sent to you on April 6th, 1962.

Q. April 9th is this——

A. April 6th is the date we have. The transmittal was April 9th.

Q. Right.

Mr. Vaughn: I would like the reporter to mark those pages, tables A and B, jointly, as Marshall Exhibit 6, for identification in this deposition.

(Tables referred to were marked Marshall Exhibit 6 and are appended to this deposition.)

[fol. 1525] Mr. Vaughn: Q. Do you have a copy of this, sir, for your use?

A. Yes.

Q. Table A, the first page of Table A is headed "Names and addresses of grocery stores of multiple outlet concerns in the Los Angeles Metropolitan area that were closed up (discontinued without a successor) during 1960."

A. That is not the heading that we had, but maybe——

Q. Isn't this the document that you sent me?

A. That is the document I sent you. Apparently the heading was re-typed on the sheet that I have. O.K.

Mr. Coyle: Let's make the record clear here now. The witness has a copy which purports to be what he sent you.

Mr. Vaughn: Q. Isn't it a fact that you sent the original of the document which has been marked Exhibit 6 to me as your work?

A. I am pretty sure this is our work. I am not positive, but I can go——

Q. I will represent to you, sir, this is what I got with your letter.

(Recess.)

Mr. Vaughn: Q. Have you determined, sir, whether this document or series of documents——

A. That is correct.

Q. —marked Exhibit 6, is the——

[fol. 1526] A. One we furnished you, yes.

Q. —the one you furnished us. Maybe you can work from this one rather than from your copy, because——

A. Better.

Q. —because I have another one here that I can use. That portion of Table A which I have described runs for one page, does it not, and then we go to that portion of Table A which is described as "Names and addresses of independent grocery stores in the Los Angeles metropolitan area that were closed (discontinued without a successor) during 1960."

A. Correct.

Q. That runs on for five pages, and then we have Table B, which is headed "Names and addresses of grocery stores of multiple outlet concerns in the Los Angeles metropolitan area opened in 1960 and close by November 15, 1961," which consists of one page, is that right?

A. Correct.

Q. And finally we have two pages headed "Table B. Names and addresses of independent grocery stores in the Los Angeles Metropolitan area opened in 1960 and closed by November 15, 1961," right?

A. Correct.

Q. Now if you would be so good, sir, as to refer to the first page of Table A and to the entity shown as Safeway at 120 South Eucalyptus, Englewood. Do you see that there?

[fol. 1527] A. Yes.

Q. All right. Then if you turn to page 2 of the Independent Grocery Store section of Table A you will see at approximately twelve from the bottom, "Best Way Market, 120 South Eucalyptus, Englewood," right?

A. Would you identify the page once again?

Q. Page 2 of the independent portion.

A. O.K., all right.

Q. I think it is 13——

A. I see it, yes.

Q. That is the same address, is it not?

A. That is correct.

Q. Can you explain to me how we have both at the same address listed under two stores?

A. Certainly. Safeway abandoned the store.

Q. So that accounts for it being listed——

A. It has closed and out. Then Best Foods——

Q. Or Best Way?

A. Or Best Way picked up this location, maybe within a month, maybe three months, maybe eight months later, maybe a year later, and then they too closed out.

Q. They closed out in 1960, did they not?

A. Right, according to our records.

Q. Now, if you will refer to Table B under "independent Grocery Stores" on the first page, the eleventh store down, [fol. 1528] that is Best Way Market, 120 South Eucalyptus Street, Englewood, isn't it?

A. I still don't see it.

Q. It is in Table B under the independents.

A. Oh, I am sorry.

Q. The eleventh one down.

A. Yes.

Q. So it closed in 1961, too?

Mr. Coyle: Mr. Vaughn, you are assuming something that is not in the heading of Table B. These are opened in 1960, and closed by November 15, 1961.

Mr. Vaughn: That is right.

Mr. Coyle: So it may have closed any time from the first of January, 1960 to November 15, 1961.

A. You see, this is giving you a style name, and Smith could have been running it as a Best Way Market, and he goes out of business and someone else tries to run it as the Best Way Market and also going out of business.

Mr. Vaughn: Q. Are your permits by trade name?

A. Our permits are carried in our alphabetical files both by the trade name and the owner.

Q. What information have you supplied on these tables?

A. Well, I have supplied whatever information we abstracted from our records, and——

Q. Is that trade name or ownership?

[fol. 1529] A. You can tell, both are given here. Sometimes they have just given us the owner's name, sometimes they have given us a style. Generally speaking we furnished you styles, style names.

Q. That is what you did, generally speaking?

A. Yes. Often they don't have any style name. Sometimes they have a style name but don't give it in the application.

Q. All right. Now, would you turn back to the first page of the table and look at the last three entries. You have a LaSalle Market at 2093 West Washington Boulevard, Los Angeles, a a Salle Market at 1914 West Washington Boulevard, Los Angeles, and a LaSalle Market at 1900 West Washington Boulevard, Los Angeles. Do you believe that those are—that would be only roughly less than two blocks apart, isn't that right?

A. Yes.

Q. Do you know whether there are three LaSalle Markets within the space of those two blocks?

A. They had permits for three, sir. They paid a dollar for a permit for each of those three locations.

Q. I see.

A. I wouldn't know any more about it than that.

Q. Sir, we have had somebody check that and we have found that there is only one market at one of these addresses, and there doesn't appear to be any sign of any [fol. 1530] other. Now do you have any information which would contradict that?

A. Only that we had three permits, that they paid $3.00 to get three permits, and the permits were furnished for these three locations. Under our law a person is required to get a permit to operate at a specific location. For some reason or other these people did get three permits.

Q. And your records would reflect three markets, is that correct, three grocery stores?

A. We have given them permits to operate grocery stores at three addresses.

Q. By the way, I take it that the information with regard to the names and addresses of the grocery stores which you have listed on your exhibit B-5 (34) for the years 1950 to 1959 would no longer be available?

A. Come again?

Q. The names and addresses of the grocery stores listed on your exhibit B-5 (34) for the years 1950 to——

A. You are talking about my affidavit?

Q. Correct, B-5 (34), showing the number of grocery

stores in each year from 1950 on, I take it that the names and addresses of those grocery stores are not available?

A. No, no.

Q. From 1950 to 1959?

A. No, absolutely not.

Mr. Coyle: You are referring to grocery stores that [fol. 1531] have gone out of business. Of course, that would be available for those that are still in business.

A. That is correct. Those that are out of business, the records are gone. Not only with respect to the grocery stores, but with respect to any permittee.

Mr. Vaughn: Would you be able to give me the name and address of any store that fell within the total 6221 in 1950?

A. I don't see that number—oh, wait a minute, O.K. On Exhibit B-5 (34)?

Q. Right.

Q. You are asking if we could give you the names and addresses of any of those?

Q. Yes.

A. We could give you the names and addresses of some of them. I would venture that probably not more than 30 percent.

Q. I see.

A. This would involve, sir, going through about two million records.

Q. I realize that. I am not going to ask you to do it.

(Laughter.)

Q. (Continuing) I just wondered if you could.

A. Yes, we could, if they were still in business.

Q. Now I take it, then, that if you have any instance where a concern has bought or has acquired permits for [fol. 1532] three locations but actually operates only one location, to that extent your figures overstate the number of stores?

A. We have a procedure whereby we submit to every multiple outlet account a list of every store that they are operating each time we send them a tax return, unless they have all of their places in one local jurisdiction, which is

defined as a city or the unincorporated area of a county. There are technicalities, but this is the way—any multiple outlet concern that operates stores in more than one local jurisdiction gets a complete listing of every store that we have licensed and we ask him to advise us of any stores that he has discontinued.

Q. But your records show three LaSalle Markets?

A. They show three LaSalle Markets, and furthermore that all three were closed out during 1960.

Q. And that makes up three of the 301 closings?

A. Yes.

Q. —reflected on Exhibit B-6 (42) to your affidavit?

A. Yes, —three of the 42.

Q. Now, if you will refer to table A in the first name under the Independent, Frank DeLeon, 1146 Effie Street, Los Angeles, and then refer to the twelfth name on that list, Antonia's, 1146 Effie Street, Los Angeles—right?

A. Yes.

Q. Now do you conclude from that that either Frank DeLeon or Antonia's acquired that market location some [fol. 1533] time in 1960 and disposed of it some time in 1960?

A. Either one of these could have.

Q. You don't know who the first in time is?

A. No. That is why I am saying either one of them could have been at that location for any period of time, five, ten years or any longer or shorter period of time, and discountinued the operation. The location could be vacant and then the other person acquired the location, and in the same year, in 1960, and closed out in 1960.

Q. Right.

A. In fact, the person might have taken out a permit for that location and never operated there. You recall on that form there is a box that says, "Never operated." People do this.

Q. Now Table B refers to those stores which were opened in 1960 but closed by November 15, 1961. Now if Table A is accurate, either Frank DeLeon or Antonia's should appear on Table B, should they not?

Mr. Coyle: You are assuming something not in the rec-

ord, Mr. Vaughn, you are assuming that either Antonia's or Frank DeLeon opened this store in 1960.

Mr. Vaughn: Isn't that the necessary implication?

Mr. Coyle: No.

Mr. Vaughn: Isn't that necessarily so?

Mr. Coyle: No on the basis of previous testimony.

[fol. 1534] Mr. Vaughn: I am asking the witness if it is necessarily so.

A. One or the other—since in Table A we are showing those that were discontinued in 1960——

Mr. Vaughn: That is right.

A. Those were discontinued. Now that means that if there was a successor the sucessor would have been in 1960.

Q. There had to be——

A. Yes. If one is a successor, there would have to be a successor, so one of them would appear back here. Now the—I am not sure whether I can give you the precise reason for that not being on there. We did try to get on Table B every close-out that we could identify——

Q. But in this instance——

A. We didn't get it.

Q. —you didn't get it?

A. In other words, this is one of the many that we could not get. I am at a loss as to how we got the name with respect to table A and not able to get it with respect to Table B.

Q. Is it possible for one store——

A. The very fact that these are on here indicates that we tried to give you everything we could.

Q. Yes. Is it possible that a store known as Antonia's was operated by a man named Frank DeLeon and that [fol. 1535] store was closed some time in 1960?

A. This is a possibility, but the fact that these are both on here, and this is probably the explanation—I think I have the explanation for that——

Q. All right, would you give it to me, please?

A. We do have some rather minor shifts in administrative district boundaries, generally occasioned by annexations on the part of cities, which go into the unincorporated area, which forces us to re-define the accounts that are

served by a particular district office. Except for the City of Los Angeles, the City boundaries must be put wholly within an administrative district for mechanical control purposes. You see, it is conceivable that if the situation you suggested might have happened, that Frank DeLeon was in, say, District A-B, to illustrate—I don't know, but just to illustrate—and when the change of district boundaries occurred he was put in, we will say, A-C—he has, however, a different account number——

Q. And so in the shift in boundaries it makes a double accounting of a single store, is that correct?

A. This could happen. It certainly is a very minor thing when you realize the few cases. But this just illustrates that when you cover a County as big as Los Angeles a little thing like this could happen. I think to the best of my knowledge this is probably the explanation of the situation, [fol. 1536] but I couldn't be sure of that.

Q. Do you know the reason for the discontinuance of the permit to either Frank DeLeon or Antonia's?

A. No, except that our reqeust for close-out of account shows that the account was discontinued without a successor.

Q. If I were to tell you that we have checked this and we have found that that property is now part of a freeway and was condemned for freeway purposes, I take it that you would have no contrary information?

A. No.

Q. You don't know why any of these stores closed out, do you?

A. No. If a freeway puts them out of business they are closed out.

Q. You don't know how many of these close-outs are due to freeways?

A. No. Our statistics reflect the number of discontinuances, and in a case where a man is put out of business to make way for a freeway there would be no successor, and this is what we have on this list.

Q. You remember we were talking about the LaSalle Market, the three entities on West Washington Boulevard, the first of which is listed as 2093 West Washington Boulevard. Would you look on the first page of Table B and there we find, a little below the middle, LaSalle Mar-

[fol. 1537] ket, 2093 West Washington Boulevard, Los Angeles. Can you tell me what the reason for that is?

A. No.

Q. It is listed as closed out as LaSalle Market in 1960 and again in 1961, is that right?

A. It is possible.

Mr. Coyle: Well, Mr. Vaughn, I think you are assuming something that is clear from the titles of these exhibits that Table A lists the names and addresses of grocery stores of multiple outlet concerns, grocery stores, in the Los Angeles metropolitan area which were closed out during 1960. The other table lists the names and addresses of concerns that were opened in 1960 and closed by November 15, 1961. A store could very well probably be on both lists, if it were opened in 1960 and closed in 1960.

Mr. Vaughn: Q. Mr. Marshall, referring to Table A, first page of the Independents, you see there No. 11 is Sims Market. Do you know whether or not that is a grocery store?

A. It was coded as a grocery store.

Q. If I were to tell you that there is no market there at all and that there is an apartment house at that address would you say that there is an error in your tables?

A. Probably only with respect to the fact that the mailing address was picked up instead of business address. This is a possibility.

Q. I see. If you will look down, then, at No. 15, the [fol. 1538] fifteenth down, Charles and Selina Doss, do you know whether or not that is a grocery store?

A. It was coded as a grocery store.

Q. If I were to tell you that it was a hot dog stand and had been for many years would you say that my information was incorrect?

A. I would say that I would question your information, sir, because I have checked out that particular account and I find that we have taken out a new application from that particular party and they went into business on January 11, 1961, so your information, I don't know how sound it is, where you got it, but your information apparently is not complete, because these people did set up a business, they

took out a permit on January 11, 1961, to operate a C. & S. Sandwich Stand.

Can you tell me where that is here (referring to document)?

Q. Yes, No. 15, sir.

A. At the address shown on Line 15 of Table A. And so it is apparent to me that if it has been operated by these people for a long time that there would be no reason for them to take out a new permit on January 11, 1961.

Q. But you haven't been able to check to determine whether they were—to recheck and determine whether they were operating a grocery store at that address prior to that time?

A. Those records have been destroyed. That has been closed out.

[fol. 1539] Q. All right.

A. But whatever they were operating there before, that account has been closed out. They have established a new account, and——

Q. If they had an account there before?

A. Well, yes. We have got it quoted as a restaurant, not as a grocery store. In other words, we agree that this is now a restaurant, and has been since January 11, 1961. What it was prior to that we don't know but our records did show it as a grocery store and was closed out in 1960.

Q. All right. Now if you will refer to the 20th name on that list, Allan D. Thompson, 4416 West Pico Boulevard, our information is that there has been no store at any time for over ten years. Do you know if that is correct or incorrect?

A. I wouldn't know.

Q. All right, sir.

A. They did have a permit, as to our knowledge they did have a permit outstanding, which was finally closed out in 1960.

Q. And if that information was proved to be inaccurate that would be an error in your tables, would it not?

A. No.

Mr. Coyle: Which table?

Mr. Vaughn: Table A.

A. No, no. Our table goes to the outstanding permits

[fol. 1540] the fact that they are not active. If they are outstanding, they are outstanding, and this is what we are reporting.

Mr. Vaughn: Q. I see. You could have a permit outstanding for as many as ten years after the business had actually been discontinued?

A. There would be—I have heard cases of this, but if a taxpayer mistakenly thinks he can use a permit in the future and hangs on to it, all he is obliged to do is to fill out the tax return and send it to us. A man operating a very small business might be reporting once a year. He gets a return once a year, it is sent to his home, all he has to do is put down, "No tax liability," put on a 5 cent stamp and return it. He figures that if he is taking the trouble of putting "No sales" and wasting 5 cents postage it is worth hanging on to this permit, in the hopes that he might be able to use it at some future date. It could be an outstanding permit. I would say that we have very few of these, but it certainly is possible.

Mr. Coyle: Mr. Vaughn, I wonder if your investigation discloses that that is a residence there now out at 4416 West Pico Boulevard?

Mr. Vaughn: I am not testifying and not answering any questions.

Mr. Coyle: It might help the witness——

Mr. Vaughn: As a matter of fact, there is no reason why I shouldn't answer that. I have a marginal note on my [fol. 1541] copy of Table A which does not supply that information and my memory isn't good enough to answer it.

Q. Now if you will look at Mrs. Corinne Davis, down that page a little ways, 1561 East 25th Street, Los Angeles.

A. What item is that, roughly?

Q. Roughly 27.

A. I have got it, yes.

Q. Again my information, sir, is that that is a dress shop.

A. Now?

Q. Now, and it has been for some time.

Mr. Coyle: That is kind of a vague statement. How long is "some time"?

Mr. Vaughn: Mr. Coyle, I am just going to ask Mr. Marshall questions and——

Mr. Coyle: Well, I am objecting to that question because you don't say how long "some time" is.

Mr. Vaughn: I haven't finished my question.

Mr. Coyle: Oh, finish your question. I am sorry.

Mr. Vaughn: I just have made a statement so far.

Mr. Coyle: Go ahead.

Mr. Vaughn : Q. Do you have any information to the contrary, sir?

A. No, I haven't attempted to check any further. You have asked for a list of the grocery stores that were in-
[fol. 1542] cluded in a list of close-outs and we did have an account outstanding at that address that was closed out, that was quoted at either a 20, 23 or 34.

Mr. Vaughn: Q. If you will go up about five to the location known as Chicago Creamery, 2116 Brooklyn Avenue Los Angeles.

A. What page, sir?

Q. The same page, first page of Table A of Independents.

A. Yes.

Q. Do you see the Chicago Creamery there?

A. Yes.

Q. At 2116 Brooklyn Avenue.

Now if you will then refer to the last page in the tables, next to the last page in the tables, the sixth down from the top—this is Table B—you will see "Mr. Solomon Chasin, 2116 Brooklyn Avenue, Los Angeles." It is my information, sir, that Mr. Chasin is still operating a store known as Chicago Creamery at 2116 Brooklyn Avenue, Los Angeles. Do you have any explanation for that fact?

A. Yes, that is easy to explain. This man's permit might have been revoked for any reason, and this is a close-out until he gets himself back in good graces. At the time we ran the study the business was not permitted and closed.

Q. Oh, you revoke permits for failure to pay taxes or other——

[fol. 1543] A. Yes, after due notice and everything else, a person can no longer legally operate. He may have actually have been closed for awhile. Nothing to stop him from

going back into business when he gets back to our good graces.

Q. I see. And is there a possibility that he could be illegally operating continuously?

A. He could be illegally operating.

Q. Now going back to Table A, the first page of the Independents, right above Mrs. Davis is Petri's Market, at 5422 Alhambra Avenue, Los Angeles, and the same entity is listed as the fifth entry on the next to the last page of the tables in Table B, Petri's Market, 5422 Alhambra Avenue, Los Angeles. Do you see that, sir?

A. The same answer I gave you on the previous case, identical, will apply here. I see it here.

Q. What is you explanation again, sir?

A. It is closed. In other words, he opened in 1960. That was the first condition. On Table A of the Independents we don't say when they were opened.

Q. That is correct.

A. In Table B we indicate that they were opened in 1960 and closed out before November 15, 1961.

Mr. Coyle: Where is this listed on Table B? I haven't found it.

The Witness: It is near the top, it is the fifth item [fol. 1544] from the top, I believe, Petri's Market.

Mr. Vaughn: Fifth item from the top.

The Witness: Fifth item from the top.

Mr. Vaughn: O.K. Now, sir, if you would turn to page 2 of Table A, listing the independents, and fourteen from the top you will see, "Henry McRay and Caesar LeFire," and then if you will move down—that is 6524 South San Pedro, Los Angeles—then if you look at the 28th entry on that page you will see "Friendly Grocery" at the same address—correct?

A. Yes.

Q. My information, sir, is that Henry McRay and Caesar LeFlore are still operating the Friendly Grocery at that address. Can you explain that?

A. This is another case where they have been closed out for not taking care of their sales tax obligations, and later on, subsequent to the time that this information was

gathered, they got themselves back into good graces. This takes a reopening.

Q. I see. Now if you will look at the top of page 3 of Table A, the first name, Robert C. Woolfork——

A. I see it.

Q. Our information is that this man was some time in 1960 operating a trailer a half mile off of the main highway on a dirt road, making sales of about $12.00 a day, and an inventory of $60.00 worth of merchandise. I take it from [fol. 1545] your prior testimony this would not disqualify him from being listed as a grocery store, is that right?

A. As I said before if his principal gross receipts came from the sale of grocery products. I don't know how else we could classify him.

Q. All right, sir. If you will look down to the seventh and ninth entries on that page 3 of Table A you will see Cox's Market and Tony's Market, both referred to as being located at 1619 Burbank Boulevard.

A. That is a very simple explanation. Either one of them, I don't know which one, went out of business at that location, and the location was vacant for any period of time. The other man went into business and he, too, went out of business within the year; that is, during 1960.

Q. Yes, sir. And you have listed both of those stores as closed without a successor, isn't that right?

A. That is correct. There is no reason why that cannot be so. It happens again and again.

Q. But as a matter of fact, there was a successor——

A. No.

Q. —operating at that location.

A. No, not necessarily. According to our records, no. any other store, as far as that is concerned, at a given location, and none of them represent succesors. Let me [fol. 1546] illustrate: I move directly to this location. I pull myself out. The store is vacant, it is vacant for two months. You come along and you decide "Maybe I can make a living operating a grocery store at this location." Two months later you go broke and you pull yourself out and the store is vacant for a month.

Mr. Coyle comes along and he tries to make a living running a small grocery store, and he could be out of business within the year. All of this could happen.

Q. In other words, we are just misunderstanding each other on the word "successor".

A. Well, successor in our case—it is a legal definition. Liability attaches. When a man goes out of business—let's put it this way: When a man buys a business, if he dosen't clear the liability of the predecessor he assumes it. So any buyer is under some compulsion in order to protect himself to see that the predecessor does not owe the State of California any sales tax liability, because if he doesn't make the necessary clearence, he assumes the liability of the predecessor. And any prudent buyer would handle the matter through escrow, which compels us to act within 10 days in establishing whether there is any amount owing on the part of the predecessor.

Many of these people just fold. The landlord, as far as he is concerned, is interested in having his place rented, and he will rent it to anyone who comes along and puts up some money.

[fol. 1547] Q. For the purposes of these tables, sir, your definition of "successor" is somebody who acquires the assets and liabilities, including tax liabilities of a predecessor, and does not include the man who may close up his store, take out all his merchandise, leave the store vacant for two months, and then someone else comes in to operate the store?

A. That is correct.

Q. And I take it you are not able to tell me which of these entities listed on these tables who closed their doors—strike that. You have listed locations here and the entities that operated them and closed their doors. I take it that you are unable to tell me which of those locations were later,—months, weeks, whatever——

A. Not at this stage.

Q. —taken up by another operator who has operated it successfully, is that correct?

A. Not at this stage. We could have told you this had your request for information been made early enough and properly phrased.

Q. Sir, looking at page 4 of Table A, the fifteenth and sixteenth entries on that page, both the Elm Haven Market, 18630 South Figueroa, the other at the same address—is that right?

A. Yes. The fact that one doesn't have "Street" in back of it and the other one does, and the fact that "Market" [fol. 1548] was abbreviated in the case of one and not in the other, does not make any difference. They are identical establishments, and here is a case I had to speculate where there may have been a successor that wasn't reported to us, and the reason that I speculate that this was the situation is the fact that the same style name was used. You see, when the same style name is used this would indicate maybe there was a sale of the property from one to another.

Q. Now, sir, if you will now turn to the first page of the Independent grocery store portion of Table B, and seventh from the bottom you see "Elm Haven Market, 18630 South Figueroa".

A. The same explanation as I gave as to the others.

Q. And if you will turn then to the second page of that table and at the very top, Norman Wallenfand and Robert DeVaun, the same address as the Elm Haven Market, is that correct?

A. There isn't any question in my mind that it is the same location, but the reasons for these changes in ownership indicates that—especially now that there is a new name here, there could have been a break in the operation.

Q. Could that have been that Norman Wallenfand and Robert DeVaun operated the Elm Haven Market and they listed it twice, once by trade name and once by——

A. No, not that. These are different account numbers. We are controlled by account numbers.

Q. I see. But in any event, the same location is listed [fol. 1549] four times in these two tables, is that right?

A. There is a difference here. There is no reason why it should be, the record ought to be clear on that.

Mr. Vaughn: All right. May I see Mr. Von der Hae's affidavit?

Mr. Coyle: I am very happy to let you see Mr. Von der Hae's affidavit (Handing document to counsel.)

Mr. Vaughn: Thank you, your are very kind.

Q. I would like to show you a copy, sir, of the affidavit of Theodore A. Von der Hae's in this case and call your attention to the document which is attached to that affidavit as Exhibit A, which is, in turn, entitled, "Table B, Analysis

of Gross sales of Grocery Stores with Estimated Annual Sales of Less than $5000.00 that opened in 1960 and closed by November 15, 1961 in the Los Angeles Metropolitan Area."

I take it you have a copy of that before you?

A. I have a copy of that before me.

Q. This is also a document which you supplied to us, is it not, in conjunction with your letter of April 9, 1962, which has been identified as an exhibit in this deposition?

A. Yes.

Q. Thank you, sir.

A. I should point out, sir, that it was a typographical error.

Q. Yes. Why don't you make the explanation on the record?

[fol. 1550] A. That occurred in the third and fourth lines under the heading of "Independent Outlets." The number of independents outlets doing from $100,000 to $140,999 annual sales should have been 10 instaed of 11.

Q. Wait just a second. O.K., thank you.

A. And the number doing from 150,000 to $199,999 should have been two instead of eleven. The total figures shown in the following column should be adjusted accordingly.

Q. To 42 rather than 52, is that right?

A. Well, the total has always been right.

Q. Oh, I see.

A. The total has been right.

Q. I see.

A. And this is why I couldn't fully appreciate why this wasn't called to my attention, because—the point I am trying to make is that the figures in the last column have to be adjusted to reflect the corrections made——

Mr. Coyle: I suggest that you read into the record those corrections in the last column so the record will be clear.

Mr. Vaughn: Yes, fine.

A. Total number of outlets that were opened in 1960 and closed by November 15, 1961 that did from $100,000 annual sales to $149,999 annual sales should have been 12 instead of 13; and the number that had annual sales from $150,000 to $199,999 should have been 3 instead of 12. The total [fol. 1551] figures on that table is correct as submitted.

Mr. Vaughn: Thank you. There is a possibility for error in the statistics which you keep, is there not, sir?

A. Any time that you deal with 360,000 outlets where you have turn-over running anywhere from 90 to 120 thousand per year and where you depend upon information being submitted by taxpayers and also help to classify these, naturally you can have some errors. The errors, however, cannot affect the overall statistical picture materially.

Q. But when we are dealing as in this case with smaller figures than you are accustomed to deal with in some respects—I mean ones, twos, and threes—the errors might become more important, isn't that right? Rather than dealing with thousands?

A. The point is that our people actually have to deal with the thousands. Now, you are only interested—your numbers are only in the percent magnitude of 4741. There isn't any question that the number of single outlet grocery stores is dropping and has dropped very materially since 1950.

Q. Do you have an opinion as to the reason for that?

A. I presume competition is just too severe for the smaller independent Mama and Papa grocery store, the small independent store. They just cannot do enough business to make both ends meet. They have give up their locations and turn to other means of livelihood. There was a 33 per cent drop in independents since 1950, a 33 per cent drop.

[fol. 1552] Q. Would you calculate the percentage of drop from January 1, 1961 to January 1, 1963?

A. You want the percentage drop from 1-1-61 to 1-1-63?

Q. Yes. You will have to go to another one of your exhibits.

Mr. Coyle: What is that exhibit?

The Witness: I know what it is.

Mr. Vaughn: B-4A (35). And this is a drop in single outlet stores.

A. B-4A (35) showed that there were 3590 outlets on January 1, 1963.

Q. Yes.

A. On 1-1-61, two years ago, there were 3818. During

the time when the population was going up approximately 6 to 7 percent.

Mr. Vaughn: Q. Your figures show also, do they not, that there are many fewer stores per thousand of population now than in 1960?

A. Oh, yes.

Q. Do you know what accounts for that?

A. The development of the larger stores that are able to serve more people.

Q. You mean fewer stores serve a greater amount of people, is that right?

A. We have more people for a given number.

[fol. 1553] Q. The stores are becoming larger, is that right?

A. Yes, stores are becoming larger. They are putting the pressure on the little stores. I don't know what came first, the chicken or the egg.

Q. You say "putting pressure on the little stores, isn't this the phenomeon that there is being fewer and larger stores because people like larger stores?

Mr. Coyle: I think this is outside his area.

A. I don't know why that is going on——

By Mr. Vaughn:

Q. You don't know?

A. No. All I know is the number of grocery stores has dropped very, very substantially, 33 percent, since 1950, at a time when the population of the County went up 71 percent—let me correct that—Instead of the County, I should say that the population of Los Angeles Metropolitan area had gone up 71 percent.

Q. Would you say that most of the stores that constitute that 33 percent have been small Mama and Poppy type stores?

A. I couldn't say just what they had been. There has been just a tremendous turn-over. This is a net change, this figure is a net change.

Q. Yes.

A. And the number of grocery stores that have changed during this 12 years period, they probably have had a complete turn-over three or four times. Now this took place

[fol. 1554] in independents. Not too much of it in terms of change in corporate structures, they go on, although they have had some changes, as is illustrated in the list of accounts. For example, Safeway closed out as they moved from smaller to larger stores; but I have nothing in the way of a frequency distribution of the amount of business done by those. There are numerous single outlet concerns that do a large volume of business. There are a certain number of single outlet concerns that report to us as single outlet concerns that in effect and in fact are multiple outlet operations. But we know this, that the 33—I should say the 37 chain stores that have 10 or more stores in California——

Q. In California?

A. In California. This is a figure that I do have. They are doing—now I am going to——

Q. I am not asking you for this information and I would appreciate it if you would not volunteer it. If Mr. Coyle wishes to elicit it by way of his examination he is privileged to do so.

Mr. Coyle: I thought you did elicit that. What was your last question?

Mr. Vaughn: I don't think I elicited anything about the State of California, which is irrelevant to this case.

Q. As a matter of fact, Mr. Marshall, going back to one thing you said a moment ago, you have always maintained [fol. 1555] that your statistics show business turn-overs and not business failures, isn't that right?

A. That is correct.

Q. Now would you say that the elimination or the decline in number of single stores is greater in the period 1950 to 1955 than from 1955 to 1960?

A. We would have to look at that. Your question is whether the decline from 19—I can't tell you that. Our statistics—we have a blank spot in our statistics in 1955, if you will look at the exhibit.

Q. Oh, yes, that is right.

A. I can't help you.

Q. How about 1950 to 1957 and 1957 to 1963?

Mr. Coyle: I am not sure the question is clear. Do you mean a numerical decline or a percentage decline?

Mr. Vaughn: Q. Let's talk about numbers first.

A. This is dangerous. You have got a different base to answer your question from. (Witness referring to documents.)

What is your second comparison?

Q. 1957 to 1963.

Mr. Coyle: What was the first comparison?

Mr. Vaughn: '50 to '57.

The Witness: That is not in any exhibit.

Mr. Vaughn: Yes, it is.

The Witness: Oh, wait a minute. This is over here. [fol. 1556] We are talking about single outlets?

Mr. Vaughn: From 1950 to 1957, the number of single stores declined by 1115, is that correct?

A. Or an average of 159 per year.

Q. And from 1957 to 1953 the decline was 660, isn't that correct?

A. That is correct. And that was how many years? That was 110 per year, so the rate of decline—you have got to do another thing here. You are dealing with a smaller base. You realize as you get down to smaller numbers, as you express it as a percent you will find that there is less difference than would be apparent in terms of comparing the figures.

Q. You get down to a point where you are not going to eliminate as many and its starts to level off, isn't that right?

A. You get to the point where the percentage might be higher, but the numerical number might be lower.

Q. I see what you mean.

A. The answer is that the rate of decline has slowed up somewhat.

Mr. Coyle: Why don't you ask him what the percentage of decline is at this time?

Mr. Vaughn: You can ask him that. You can ask him that. I am not going to be your anchor.

The Witness: Do wou want me to calculate it? I will do whatever you want.

[fol. 1557] Mr. Vaughn: No, I would like my examination just to be just what I want to ask you, and Mr. Coyle can ask you all the questions that he wants to.

The Witness: Well, I thought I answered your question.

Mr. Vaughn: I am sure you did. I asked you what was the decline between 1950 and 1957.

Mr. Coyle: Then I asked you whether you were referring to the numerical decline or the percentage decline.

Mr. Vaughn: And I said numerical.

Mr. Coyle: And you said we will start with the numerical.

Mr. Vaughn: Yes, and I decided not to go on.

(Laughter.)

The Witness: I think my answer does indicate——

Mr. Vaughn: You just answer my questions, Mr. Marshall.

A. I am trying to.

Q. Right.

The Witness: I have been all afternoon.

Mr. Vaughn: Mr. Coyle, let's have him do it numerically, I mean on an average, or a percentage, I beg your pardon. The same thing on a percentage.

(Witness computes on a piece of paper.)

Mr. Vaughn: While he is doing this, I want this on the record, Mr. Reporter. Mr Coyle, I have tried to refrain from interrupting your witnesses with questions to ask. Out [fol. 1558] of courtesy, I wish you would give me the same courtesy.

Mr. Coyle: I am just trying to——

Mr. Vaughn: You are trying to be helpful, I know, Mr. Coyle.

Mr. Coyle: That is correct.

The Witness: The approximate average annual rate of decrease in single outlet stores between 1950 and 1957 was about 3 percent. Between 1957 and 1963 it was around 2.4 percent.

Mr. Vaughn: O.K.

A. These are rough calculations. Both numbers would be subject to very slight adjustments.

Q. Thank you, sir. Would you turn to Exhibit B-6 (36) to your affidavit, please. According to your records, sir, were there more single outlets opened in the year 1960 than there were multiple outlets?

A. Yes.

Q. And I take it that this would mean a new entry into business? Or let me ask it this way—strike that. If a man who had one store opened a second store, would that be reflected as an opening of a multiple outlet?

A. Not necessarily.

Q. If he filed a consolidated return for the two stores would it be?

A. No, it would be an increase in the multiple outlets. [fol. 1559] Q. An increase in the multiple outlets?

A. Yes.

Q. So each of the 128 openings by single outlets were people who, so far as your records show, had only one store? That is the first store they opened?

A. No, my records do not show this. All this says is that someone came in and filed an application for a sales tax permit at a specific location, and as far as he was concerned he was going to report to us the business at that location on a separate tax return.

Q. That is all that intends to say?

A. That is all that it says.

Q. If you will turn to Exhibit B-7A (37), you list there the number of stores opened in 1960 by the 10 largest chains, the next ten chains, the remaining multiple outlets, and single outlets, is that correct?

Mr. Coyle: The title speaks for itself. It says "Obtaining permits."

Mr. Vaughn: All right, O.K. Those obtaining permits in 1960?

A. Yes.

Q. Now would you tell me what the total is for the number of permits obtained by the leading 20 chains in 1960?

A. The leading 20 chains obtained 67 new permits.

Q. And new permits were issued to all other concerns [fol. 1560] outside of the top 20 in what number during 1960?

A. This is multiple and single, is that what your question is, sir?

Q. Everything but the leading 20 chains.

A. Everything but the 20? 179.

Q. If you will turn to Exhibit B-7E (41) to your affidavit,

sir. Under the heading "Single outlets" you indicate that there were—of the 127 grocery stores which obtained permits in 1960 and were operated as single outlets, how many still retained their permits as of November 15, 1961?

A. 74.

Q. Is that more than half?

A. That is obvious.

Q. It is 58.3 percent, as a matter of fact?

A. Yes.

Q. Now, how many of those 127 outlets had their permits discontinued?

A. The difference between those two numbers.

Q. Doesn't that mean, sir, that if 74 retained their permits and the difference discontinued their permits that you did not cull out from the difference on Exhibit B-7F (42) those who may not have retained their permits but were washouts?

That isn't very artfully worded. Would you like me to try it again?

A. I think I follow your question.

[fol. 1561] Q. In other words, what I am saying, sir, is that if you compare Exhibit B-7E (41) and B-7F (42) you will show that every store opened by a single outlet operator in 1960 was either accounted for in the discontinued permit category, or the retained permit category, isn't that right?

A. The numbers in these two charts balance completely.

Q. Yes. So isn't it a fact that in developing these statistics you did not cull out the washouts from the discontinuances?

A. Oh, yes, in both cases we culled out the washouts. Didn't put them in.

Q. They are not in the 127 Universe, is that it?

A. Yes, that is right.

Q. But the 127 Universe was taken from those—not from those who discontinued their permit without a successor and those who retained their permit, that is not how you got that figure; instead, you got it from counting the number of new permits in 1960, isn't that right?

A. I got it from the number of people that got new permits that were new openings, not successors.

Q. New openings, right.

A. New openings.

Q. So that is 127, right?

A. Yes.

Q. Of those new openings, then, there was not a single [fol. 1562] one where the permit was not either retained in the name of the original entity or discontinued without a successor, is that correct?

A. That is what we——

Q. So there wasn't a single wash transaction out of those 127?

A. That is right.

Q. Your records do not reveal a single washout?

A. That is the point, yes.

Q. So your previous testimony that—I take it that you have examined each one of these 127?

A. We examined every account as an individual entity and used the information submitted to us with respect to that account.

Q. And you did not find a single instance in which a store was sold to a successor, right?

A. They were eliminated.

Q. No. Let's get back to that. They were not eliminated from the 127 openings, were they?

A. Yes.

Q. The ones that were opened in 1960 and sold to a successor prior to November 25, 1961 are not listed in your tables as openings at all, is that your testimony?

The Witness: May I have that——

Mr. Coyle: Here is your affidavit (handing document [fol. 1563] to the witness).

Q. So you have understated the number of openings for the year 1960?

Mr. Coyle: Which exhibit are you referring to, Mr. Vaughn?

Mr. Vaughn: Let's look at Exhibit B-7A (37).

A. These are the new openings.

Q. All of them?

A. The new openings, not where a store has already been there and where—and where equity was sold.

Q. I see.

A. In other words, the wash transactions are excluded from this.

Q. I don't think, sir, that you fully understand. In other words, on Exhibit 7-A (37), the 127 figure in the total column under "Single outlets" means only brand new stores, is that right?

A. That is correct.

Mr. Coyle: What does a brand new store mean?

A. Brand new in the sense——

Mr. Vaughn: That it wasn't acquired from anybody else.

A. Right. If Safeway went across the street into a bigger operation this would be a brand new store.

Q. Oh. And if it closed its store across the way you would say this is an opening?

[fol. 1564] A. No. It would be a close-out. You said if he closed. Maybe I didn't hear you right.

Q. Suppose Safeway has a store, a smaller store, which it decides to close, and moves across the street and opens [fol. 1565] another store?

A. That would be a new store.

Q. That would be one of the 127?

A. That would be one of the 127.

Q. All right.

A. But if they sold the smaller store that would not be one—to a grocery concern, to an independent or chain or to one of his employees, this would not be a new opening.

Q. And you culled out, sir——

A. That would be a wash transaction.

Q. All right.

A. A plus and a minus.

Q. But you admit the possibility that there may be some——

A. We have indicated that there is a possibility that there could be some of these cases, but certainly not any great number.

Q. Well, you know there are some of those cases, don't you?

A. I say there could be. If I had known them we wouldn't have——

Q. Right.

A. It is what the record shows. These figures are based on what the record shows of the individual documents that were processed.

[fol. 1566] Q. So we have 127 new stores opened in 1960?

A. Correct.

Mr. Coyle: Now, new stores doesn't mean that it is a brand new store necessarily. It may be an old store that has been deserted?

Mr. Vaughn: Now, please don't testify.

The Witness: I am trying to keep it straight, this is what we have been saying all afternoon. I have been saying all afternoon——

Mr. Vaughn: Q. This 127 consists of what, now? Tell me what it consists of.

A. It consists of new stores which are a new entity that sets up business at a location that—it is either in a brand new building or could be in a building that had been vacated by a food store and been vacant, where the individual did not acquire the business from a predecessor that was operating a grocery store. To me—I don't know English, it is inclined to get——

Mr. Vaughn: Q. Pretty complicated?

A. Complicated. But——

Mr. Vaughn: I think that is clear, what you said.

A. I am trying to say, and I think you appreciate it, that these are new rather than successors.

Q. All right. And all of those were operated by people who, if they had another store, didn't tell you about [fol. 1567] it?

A. No, that isn't the case at all. I am trying to make clear to you that the choice of how a person is going to operate is up to him. Maybe I didn't get your question. Let's back up and try——

Q. I am just trying to interpret this 127 to the words "Single outlets." That means at least this, that that store was opened by somebody, who filed a separate return for that location?

A. That is the point.

Q. All right.

A. That doesn't mean that he doesn't have one or two

or three other grocery stores, and it doesn't mean that he couldn't be reporting on the other three as a chain. It is his choice. We don't attempt to tell them which way to file.

Q. All right, sir. Now if you will turn to Exhibit B-7E (41)?

A. O.K.

Q. That 127 single outlets in the first column is the same 127 that is referred to and that we have just been talking about——

A. Yes.

Q. —on Exhibit B-7A (37).

A. Yes.

[fol. 1568] Q. Now, 74 of those 127 outlets retained their permits, at least past November 15, 1961, without any change of any kind whatever, is that right? The same entity was operating those 74 stores by November 15, 1961 as had opened the stores, isn't that right?

A. According to our records that is correct. There may have been a change of entity, but our records wouldn't show that, such as a man married and brought his wife in and we would not find this out for a year or two, but basically our records show that the same man was operating the business on November 15th.

Q. And it is your testimony that all of the remainder of those 127 stores were, so far as your records show, discontinued without a successor by November 15, 1961, is that correct?

A. Yes.

Q. So of the 127 stores which we started with you did not find a single discontinuance with a successor, isn't that right?

A. No, I think that of the 53 stores that were discontinued, some of them may have had successors.

Q. Yes. Isn't it a fact, sir, and doesn't your affidavit say it, that you did not cull out the wash sales, that if a permit was closed or discontinued for whatever reason that you included that in your tables?

A. No, I think we have to—we look at brand new [fol. 1569] grocery stores. That is our base.

Q. That is the 127 are brand new grocery stores?

A. Those are the brand new grocery stores, and of

those brand new grocery stores only 74 were still in business under the same ownership on November the 15th.

Q. But they could have been in business under a different ownership, isn't that right?

A. Yes, I think they could be under a different ownership.

Q. In fact, they all were, weren't they?

A. No, because—no, absolutely not, because there is a net decrease of—during that period of 132, a net decrease of 132.

Q. Right. But suppose——

A. Now it may not have been—out of this 127 there could have been out of the other businesses some that were registered and licensed before January 1.

Q. Oh, I see. You did not take the 127 brand new grocery stores and chart what happened to them, you just took 127——

A. Yes, we did chart what happened to them. There were 74 left of those.

Q. All right. What about the other 53, what happened to the other 53?

A. Well, the other 53, we didn't attempt to indicate [fol. 1570] what happened to the other 53.

Q. You just indicated that their permit had been discontinued?

A. Their permit had been discontinued. These people had gone into business in 1950 and they were no longer in business on November 15, 1961.

Q. They could have sold to a successor?

A. Yes, I think they could have sold to a successor.

Q. And there could have been a partnership in which they originally opened the store and took out a permit, and changed to a corporation?

A. It could have been.

Q. It could have been that a partnership added a partner and added a new entity and they took out a new permit?

A. Yes.

Q. Could have been a corporation going back to a copartnership, could it not?

A. Yes; not too likely, though.

Q. It could have been that a partner died or retired, isn't that right?

A. That is right. But the fact still remains that there were 132 fewer stores. Some of them were in this category.

Q. Which category?

A. Those that opened after January 1, 1960 and were no [fol. 1571] longer in business on November 15, 1961.

Q. Without a successor?

A. Without a successor. In other words, what brought about this net decline of 132, we studied to what extent the 127 that were in business and were no longer operated by the same entity.

Q. All right, sir. Now, you deduced that some of those 127 went out of business without a successor because the total number of single stores——

A. I am just confident they did.

Q. You are confident, but you don't really know, do you?

A. Oh, I am absolutely confident.

Q. You base that on the fact that the total number of stores went down?

A. Yes, that is right.

Q. All right. Now, could it be that 260—259 stores operated as single outlets who had obtained their permits before 1960, could have gone out of business in 1961?

A. Will you repeat that again?

Q. Is it possible 259——

A. Where do you get the 259?

Q. Well, I will tell you where I get it. I take the 132, which is the net decrease in numbers of stores between 1960 and 1961. I added that 127 and I get 259. Now if 259 [fol. 1572] stores who had permits, had obtained permits prior to 1960, had gone out of business in 1961, you would still show a net decline in total number of stores of 132, even though not a single one of the 127 had discontinued operations, isn't that right?

A. Actually a far greater number than 259 went out of business in this period we are talking about, far more than 259.

Q. Right. So it is not necessary at all to conclude that any of those 127 stores went out of business?

A. I am confident that some of the 127 stores went out of business, absolutely confident.

Q. Brand new stores, just built?

A. No, they don't have to be just built.

Q. I thought you told me that 127 were brand new stores?

A. They were brand new stores in terms of someone has gone into a location—a building maybe 40 years old. It still is, as far as we are concerned, a brand new grocery store. But it is not necessarily a new building, and there is certainly no reason why one of these operators could not be out of business over a period of five months or a period of 21 months, 23½ months, 22½ months.

Q. Would you refer to page 11 of your affidavit. Is that what you mean when you say in reference—the second sentence beginning on page 11, "As reflected in B-6 (36), the [fol. 1573] issuance of a permit to operate a new store would be reflected as an opening."

Does "New store" mean either a brand new store or one that——

A. In an old building, absolutely. When you say a "new store" it has no reference whatever to the physical facility in which the operation takes place.

Q. I understand. And a discontinuance of a permit would be classified as a closing, no matter what the reason for that discontinuance, isn't that right, on your statistics.

Mr. Coyle: I think Paragraph 11 read as a whole sales that.

Mr. Vaughn: Q. Isn't it a fact that a discontinuance of a permit for whatever reason would be classified as closing in your statistics?

A. Yes. For any reason, if we have to take one out of our inventory.

Q. All right, now, sir, this is certainly not intended to embarrass you in any way, I want you to understand it that way; but we have talked before about the possibility of error in your statistics, and I would like to bring up something which I think will give whoever reads this deposition an opportunity to see a living example of it. Do you remember in February 1962 when I was in your office you showed me a series of correspondence between you and a [fol. 1574] representative of King City, California. First

of all you told me, and is this the fact, that the State Board of Equalization collects city sales taxes and refunds them to the cities, isn't that right?

A. It dosen't refund them, it subvenes them for the city. It collects them under contract for the city.

Q. Do you recall that the representative of King City had written to you asking you why the amount convened to them for a particular year had fallen down? Do you remember that?

A. No, but go on——

Q. And you wrote back and tried to explain it to them and stated——

Mr. Coyle: I object to that. This is far removed from the grocery business in the Los Angeles Metropolitan area.

Mr. Vaughn: Well, I think that it is relevant, and I think you will see it is relevant, Mr. Coyle. I am trying to lay a foundation.

Q. And they wrote you back and said one of the reasons was the discontinuance of the business conducted under the name of King City Pharmacy? Do you remember that?

A. Yes, I remember.

Q. And they wrote back to you and said to you that the King City Pharmacy was still kicking along very well and [fol. 1575] was in business?

A. Yes.

Q. And you made an investigation, and do you remember what you determined?

A. They were still in business.

Q. Yes. As a matter of fact, the King City Pharmacy was operated by a corporation which also operated a pharmacy in the nearby city of Greenfield, isn't that right?

A. That is correct.

Q. And you had listed on your records because they apparently did not file a consolidated return as two single outlet drug stores, isn't that right?

A. That is correct.

Q. And your investigation established that the Greenfield Pharmacy run by the same corporation had been sold to a successor, isn't that right?

A. Yes.

Q. And you had mistakenly recorded that on your books?

A. As a close-out.

Q. —as a close-out of the King City Pharmacy without a successor, isn't that right?

A. Right.

Mr. Vaughn: I have no further questions.

The Witness: I would like to make this quite clear to you.

Mr. Vaughn: Yes, sir.

[fol. 1576] The Witness: This is a very unusual case, and while it is true, as I stated before, you are dealing with 360,000 units with a turn-over of from 90 to 120 thousand a year, you can run into real odd-ball situations. I hope you don't feel that because of the situation, one situation—and I will even concede there may be two or three, or five or ten others—that this would invalidate a running inventory that we have maintained that shows rather clearly over the years what has happened to these independent stores. They are just going down, down, down, and there is no way that you can say that they are going down because we have got our stores misclassified, or because we have closed out a store erroneously.

You realize that we are dealing here with net change. In the case which you have cited, which really isn't relevant, we did close it out, we did reopen it, and as of this moment the record is absolutely sound.

Mr. Vaughn: Yes, sir.

Q. And King City has got all the money that they were entitled to. The handling of this particular account left something to be desired, it meant a temporary delay in getting the money to King City. What we are taking—we are continually policing our classifications, the codes that we assign—I should say the industry code numbers that we assign, and we take a physical count of each class [fol. 1577] of business in every city and county of the State.

I don't think that there is a State in the Union that devotes the time and energies to coming up with the best possible factual situation that relates to business activities in California, and we are dealing in these numbers that are showing the net changes that have taken place. We have attempted to answer specific questions that have been put to us by Mr. Coyle or members of his staff.

Mr. Vaughn: Yes, sir. Thank you very much.

Mr. Coyle: Are you through?
Mr. Vaughn: I am through.

Cross-examination.

By Mr. Coyle:

Q. Mr. Marshall, are part of your duties consulting with people in the tax field from Governmental departments other than the State of California?

A. Yes.

Q. Have you consulted with many of them during the past few years?

A. Yes.

Q. What Governmental agencies have they represented?

A. Well, for example, I served as a consultant to the Russell Sage Foundation which was retained by the City of New York to establish a reporting procedure for the City of New York; for the State of Kentucky, the Province [fol. 1578] of Ontario, and we have had many people who have wanted to learn how we administer statistics and taxes in California from all over the world and through the auspices of the I.C.A., which is the International Cooperation Administration, and the C.I.E., which is the successor to that agency.

Q. Does the State Board of Equalization of the State of California have a national reputation in this field?

A. I daresay that we do have a national reputation, and it is the outstanding sales tax administration in the United States, and it is because of this that the Federal Government does send most of the people that they bring into this country to learn the effective means of tax administration to the State of California, to the Board of Equalization.

Q. How do your statistical records compare with the records kept in other states?

A. I don't think that there is—I am confident that there isn't another State agency that puts out the volume of statistics that we do. At the present time we report both quarterly and provide annual recapitulations of taxable sales by type of business for 56 of the 58 counties, and for 128 cities in our quarterly reports and 180 cities on our annual recaps. This is a rather considerable volume

of statistical data on the business activity occurring within the jurisdiction of the State of California.

[fol. 1579] Q. Do you furnish statistical information to persons and firms and Governmental agencies who request such information?

A. We do. We have been for years. There is hardly a citizens group or a consulting firm working for a citizens group that proceeds with an incorporation without first consulting with us to ascertain the effect of such incorporation. We establish through our records the amount of tax revenue that they would get upon incorporation, not only for sales tax but alcoholic beverage exercise tax and license fees, and in lieu taxes and gas taxes.

Q. Now, this information that the Department of Justice required you to supply us, is it your testimony that it all came from the records of the State Board of Equalization with the exception of population figures?

A. It all came from the records of the Board. We did our very best to give you a factual portrayal of what was in our records, we relied on estimation techniques only where it became necesary, because the taxpayers didn't give us information with respect to gross sales. The techniques we use for converting taxable sales to gross sales I am sure would be agreed by anyone who is familiar with statistical procedures where the only sound procedures to use, and actually very little estimating had to be done, but there were a few instances where we were obliged to make esti- [fol. 1580] mates. This is why some of the table headings include the word "estimate." We wouldn't want to tell you it was reported to us by a taxpayer when in fact it wasn't.

The bias resulting from this work could be either way. In terms of the total project, probably, this is not distorted very much in either direction. I couldn't tell you which way without analyzing individual cases where I might make observations that perhaps in this case we have an over-statement and in that kind of a situation we might have an under-statement. These things do tend to balance out.

Q. Now referring to Marshall Exhibit B, which is entitled "Los Angeles Metropolitan Area, number of grocery stores versus population 1950 to 1961." Does this exhibit portray the actual history of the grocery business in Los Angeles as reflected in your records?

A. It certainly does.

Mr. Vaughn: To the extent that it goes, that is.

A. I have attempted to define what we mean by an outstanding permit, and these figures do represent the inventory count that we have in our basic tabulations, and our basic tabulations are available for inspection, and you will find that this is what the tabulations show. To the extent that we might have some misclassifications, they would be counted here, but they would be very few, and certainly it isn't misclassifications that describe this picture, it is a [fol. 1581] situation that is just apparent, what we find in the economy and has been in the economy over this entire period. I don't imagine that this trend is going to reverse itself either in the next five to ten years.

Mr. Coyle: Q. Now, referring to Marshall Exhibit B-4A (35).

A. Yes.

Q. Does this Exhibit contain information that I requested you to get within the last two months in order to bring Exhibit B-4 (33) up to date?

A. It does.

Q. And does this accurately reflect the comparison between the permits issued to single and multiple outlet grocery stores in the period 1960-'61?

A. It does.

Q. Now referring to Marshall Exhibit B-5 (34), does this exhibit show mathematical computations based upon the material appearing on Marshall Exhibit B-4 (33)?

A. It does.

Mr. Vaughn: Mr. Coyle, isn't this reflected in his affidavit?

Mr. Coyle: I think it is, yes.

Q. Now, referring to Marshall Exhibit B-6 (36), does that accurately portray the grocery store openings and closings in the Los Angeles Metropolitan area for the [fol. 1582] calendar year 1960?

A. It does.

Q. Now, referring to Marshall Exhibit B-6 (36), which shows single outlet openings and closings in the year 1960, and referring also to the table which has been marked

Marshall Exhibit 6 for identification for this affidavit, and calling your attention to Cox's Market and Tony's Market, both of which are listed on page 3 and are represented to be—reading the heading—the names and addresses of independent grocery stores in Los Angeles Metropolitan area that were closed and discontinued without a successor during 1960. Does this exhibit indicate that both Cox's Market and Tony's Market were closed in the year 1960?

A. It does.

Q. And does it show them both at the same address?

A. It does.

Q. And then referring over to table B, the part marked "Names and Addresses of independent grocery stores in the Los Angeles Metropolitan area opened in 1960 and closed by November 15, 1961, do you find either Tony's Market or Cox's Market on that list?

A. I find Tony's Market.

Q. But you do not find Cox's Market?

A. I do not find Cox's Market.

Q. Now, referring to Table B and Table A together—[fol. 1583] well, what would that indicate with respect to Cox's Market? Would that indicate that Cox's Market obtained its permit prior to 1960?

Mr. Vaughn: You are leading the witness, Mr. Coyle. I object on that ground.

A. Now what do I do?

Mr. Vaughn: You answer it.

A. This is what it would indicate, yes.

Mr. Coyle: Q. It would indicate——

A. That Cox's Market was opened—not necessarily so, but very likely, it was opened prior to 1960 and closed out in 1960, and the store at that location remained vacant for some period of time, after which Tony's Market was opened at that location.

Mr. Coyle: Q. And the heading of Table B indicates what?

A. That Tony's Market was subsequently closed prior to—was closed prior to November 15, 1961.

Q. And when you refer to "discontinued without a successor" in Table A, does "Successor" have a particular word of art meaning in your operation?

A. It does. It means that the taxpayer upon closing his permit, generally in order to get back his cash deposit, told us that he was closing out his business, and was not selling it to another entity.

[fol. 1584] Q. Now referring to the chain stores in the State of California, have you made any analysis to ascertain what percentage of all chain stores in the Los Angeles metropolitan area are operated by chains of 10 or more stores?

A. I have.

Q. Can you supply us with that information? What is that information?

A. Would you repeat the last part of that question, so that I can be sure that I give you——

Q. Have you prepared statistics with respect to the percentage of chain stores in the State of California which are operated by chains of 10 or more stores?

A. I have.

Mr. Vaughn: I will object to the admission of any evidence regarding the State of California as a whole, since it involves areas outside of the relevant section of the country in this case.

A. Would you like to have the information with respect to the number of multiple outlet stores operated by chain stores in the L. A. Metropolitan area?

Mr. Coyle: Q. Fine.

A. Well, of the chain stores having 10 or more outlets in California, 759 stores were located in the Los Angeles metropolitan area.

Mr. Vaughn: Would you hold it just a minute, now? [fol. 1585] Right there, and I would ask the reporter to read that much back.

(Record read by reporter.)

Mr. Vaughn: All right, sir.

A. This represented 79.2 per cent of all of the chain

stores with location of business in the Los Angeles Metropolitan area.

Mr. Vaughn: If I understand that, and I am not sure that I do, I move to strike it in that it relates in part to areas outside the metropolitan Los Angeles area.

Mr. Coyle: No, excuse me, he said he related this to the Los Angeles Metropolitan area.

Mr. Vaughn: But with chains operating ten or more stores in California. I am sorry, my objection still stands, —my motion still stands.

Mr. Coyle: Q. Well, now, do these chains operating ten or more stores in California, operate ten or more stores in the Los Angeles metropolitan area?

A. I have a figure here of the number of chain outlets or multiple outlets that have ten or more in the Los Angeles metropolitan area?

A. I have a figure here of the number of chain outlets or multiple outlets that have ten or more in the Los Angeles metropolitan area. Do you want that?

Q. Yes, let me have that.

[fol. 1586] A. There are 752 that have ten or more outlets in the Los Angeles Metropolitan area. This is what they have exclusively in the Los Angeles metropolitan area without any reference to what their total number of outlets in the rest of the State are.

Q. How many chains are those?

A. 23.

Q. 23 chains. How many outlets do these 23 chains have in the Los Angeles metropolitan area?

A. 752.

Q. Do all of these chains have more than 10 outlets in the metropolitan Los Angeles area?

A. All of these have ten or more in the Los Angeles metropolitan area.

Q. What percentage of all the chain stores in the Los Angeles metropolitan area do they represent?

A. 78.5. Of course, the conclusion to be drawn from this is that there are very few small chains in the Los Angeles metropolitan area.

Mr. Vaughn: Move to strike as not responsive.

Mr. Coyle: Q. Have you formed any conclusion as to

whether there are very small chains in the Los Angeles metropolitan area shown in your listing of multiple outlets stores in the Los Angeles metropolitan area?

A. There are only—I want to be sure (referring to [fol. 1587] documents)—that was 958, as I recall—there are only 206 chain stores or stores operated by multiple outlet concerns reporting to us on a consolidated basis, and these 206 are made up of chains having 9, 8, 7, 6, 5, 4, 3, and 2 outlets. This does not leave room for many chain stores. I did not make a tabulation in terms of those having 9, 8, 7, 6. I remember just in compiling this information using 10 or more as a basis of compiling the figures, that there were some, I distinctly remember one with nine, or some with eight, right down the line. The only conclusion I can draw from this is that there were not many chain stores that operated these 206 grocery stores in the Los Angeles Metropolitan area.

Q. Now have you read the affidavit of Everett F. Basini?

A. I have.

Q. Does anything in Mr. Basini's affidavit indicate to you that your exhibits which you prepared for the United States Government at our request are in any way inaccurate —in any material way inaccurate or fail to accurately show what they purport to show?

A. No. I went over these cases, I didn't bother to attempt to validate the information except for two items that I did look up, and just on the strength of those—I didn't see just what he was actually driving at. There are [fol. 1588] many cases cited here pointing out that these places were torn down to make way for a freeway. Well, our statistics were not attempting to explain why these places were closed out. They are simply a recital of the businesses that were closed out, without any attempt to evaluate why they were closed out. They are gone. All our figures are an attempt to show what the net picture is. Ordinarily you would assume that if a freeway goes through and knocks out ten stores that perhaps ten new stores would appear some place. This apparently has not happened.

It seems that as additional stores are licensed they apparently are bigger than the previous stores and can serve a greater number of people. They are a net attrition or gradual attrition of the single outlet stores.

Q. Now, calling your attention to Mr. Basini's comments with respect to Charles B. Doss and Selina Doss, what check did you make with respect to that matter?

A. I just, as a matter of curiosity, tried to figure out why we would code a hot dog stand as a grocery store, because that is a pretty far fetched kind of mistake to make, and I found that this entity took out a new application to do business at 2231 South Griffith Avenue on January 11, 1961, which is quite apparent that whoever was operating at that location before discontinued business, and it went on—this application went on to say that they weren't [fol. 1589] buying the business, so we were just obliged to conclude that this was a new operation taking up at this location.

Q. Is this report a public record? (Exhibiting document to the witness.)

A. I don't believe that that is a public record. The information with respect to the name, the address, the date it started business and the manner in which it is coded is a public record.

Mr. Coyle: Off the record.

(Unreported discussion off the record.)

Mr. Coyle: All right, mark this as Marshall Exhibit.

(A copy of the application for Seller's Permit of Charles B. Doss and Selina A. Doss was marked Marshall Exhibit A for identification.)

Mr. Coyle: I ask you to identify for the record Marshall Exhibit A.

A. I should point out in this connection that if they wanted to change the nature of business at this location they would not have to pay another dollar to do so. There is nothing that prevents us from changing the class of business. We just do this whenever we learn——

Q. Will you identify the document? State what it is for the record.

A. This is a copy of the application for a seller's permit and registration as a retailer and Department of Em- [fol. 1590] ployment Registration as an employer. This place apparently is very small in that they have no em-

ployees. I should also point out that on this application there is a change in administrative district, and when this is done we do not take a new application. This is just done as an administrative change.

Mr. Coyle: I have no more questions.

Redirect examination.

By Mr. Vaughn:

Q. Mr. Marshall, with respect to Mr. and Mrs. Doss, your records show that they operated a grocery store at this address which was discontinued?

A. That is right.

Q. In 1960?

A. Yes, some time in 1960.

Mr. Coyle: Did you give the name of Mr. and Mrs. Doss to defense counsel?

A. Yes, and there was some testimony with respect to this.

Mr. Vaughn: Earlier, yes.

The Witness: We talked about this, yes. I don't know whether I can find it, but he raised this case. I don't know whether I can find it. I do believe that the address was the same.

Mr. Coyle: It indicates that they discontinued business [fol. 1591] in 1960.

A. And then they opened another business in 1961.

Mr. Vaughn: Q. At the same address?

A. At the same address, that is right.

Q. And this could have been December, 1960 when they discontinued operation as a grocery store?

A. Yes, according to our records.

Q. Yes. Well, now, let me finish: And in order to change from a grocery store to a sandwich stand they didn't have to pay another dollar to get a new permit, as you indicate, isn't that correct?

A. That is correct, they would not.

Q. So it is kind of puzzling that they would do this, isn't it?

A. Yes, I don't understand. I would deduce from this that they did go out of business as a grocery store and subsequently went back into business, now operating a sandwich stand. Mr. Basini made some comment that this had always been a hot dog stand and he couldn't understand why we classified it as a grocery store.

Q. Yes, I think that is a fair statement.

A. Apparently, it wasn't always operated—I think Mr. Basini must have been wrong, I don't know where he got his information, because apparently there has been a break here at some time. I can't explain it.

[fol. 1592] Q. Yes; you can't explain it, you were deducing from the information which we have just shown you what happened?

A. I am giving you the best I can.

Q. That is right. And Mr. Basini, if he made personal observations, he could have come to different conclusions, could he not?

A. Well, this matter of making personal observations, I don't know who he talked to or anything else. As long as this statement is in here, that led me to believe that he didn't really appreciate what the statistics we furnished purported to be, and I just don't know why he indicated that this particular store had closed in order to make way for a freeway, because it is closed. We didn't say that any particular store was closed for any other reason. We didn't give any reasons for closing, we weren't asked to give any reasons.

Q. Yes, sir. But you understand, of course, that there is more than one issue in this lawsuit. Let me ask you just one further question, if I may; with respect to your Exhibit B-6 (36): The title on that exhibit is "Grocery Store openings and closings," and it goes on to say other things; but I think it is fair to say that your previous testimony has established that closing in that context did not necessarily mean that it is closed and never again a [fol. 1593] grocery store, is that right?

A. That is correct.

Mr. Vaughn: I have nothing further.

Recross-examination.

By Mr. Coyle:

Q. I have another question—I want to ask the witness several questions. What do your records show with respect to Selina Doss and her husband? Charles and Selina Doss, what do your records show with respect to them prior to 1961?

A. That they operated a grocery store at 2231 South Griffith Avenue in the City of Los Angeles and that that business was closed out and there was no successor. The business just closed. I did not pinpoint it beyond that. They might have explained why it was closed out. All we were interested in was identifying a grocery store that closed out. The establishment was classified as a grocery store. We didn't go behind that. After all, it is in our statistics as a grocery store—I think that answers the question.

Q. Then after the permit lapsed what do your records show with respect to that address in 1961?

A. That a sandwich stand that served no beer or wine or other liquor was opened there on the 11th of January, opened at that same location, and that they did not buy [fol. 1594] this business from a person that was operating at that location on January 10, 1961, or that actually was in a position to operate that business prior to January 11, 1961.

Q. Now referring to Exhibit B-7—no referring to Exhibit B-6 (36), which shows 128 single outlet openings in the calendar year 1960, have you any reason—I believe the question has been raised that that should be 127. Would that be your understanding, too, Mr. Marshall?

A. I would think that the 128 is correct and that Exhibit B-7A is deficient by one single outlet. I am confident that the 128 figure in Exhibit B-6 (36) is the correct figure with respect to openings, and that the 127 on any of the subsequent exhibits where 127 appears instead of 128, that we parently lost track of one of the single outlet openings of 1960.

Q. Very well.

A. This would be my——

Q. Would this difference of one materially affect your figures?

A. I just can't see how this could have any material effect. Much of the discussion this afternoon has indicated dealing with all of these changes, certainly a difference of one is not material. You must realize that we are relating—we are talking in terms of some net total of 4741 net grocery stores, we are talking about net turn-over of in [fol. 1594a] single outlets of 132 cases.

Mr. Coyle: Would Counsel object if we had Mr. Marshall revise these exhibits to adjust for this one store if he can locate the cause of this deficiency?

Mr. Vaughn: If he can, but you said it isn't material.

Mr. Coyle: All right, that is fine.

Mr. Vaughn: We are not going to make a point out of that.

A. I am not sure that I could, though either. I mean——

Mr. Coyle: Because these records are destroyed.

A. Well, no, these records are not, but the fact that—it seems to me that one got lost some place between the preparation of the original number, and where we were taking off some of these——

Mr. Coyle: I have no more questions.

Mr. Vaughn: No more questions. Thank you very much, Mr. Marshall. I am sorry to keep you over.

Mr. Wight, I am sorry to keep you over.

Mr. Coyle: Oh, one thing now, because of the time factor—Off the record.

(Discussion off the record.)

Mr. Coyle: Put this on the record.

Mr. Marshall, are you agreeable to waive the signing of the deposition, and will you permit Counsel to introduce the [fol. 1594b] deposition as your testimony, if they agree between themselves to do so?

The Witness. Yes.

Mr. Vaughn: I so stipulate on behalf of the defendants.

[fol. 1594c] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES H. CARR, Judge Presiding

[Title omitted]

No. 336-60-CC Civil

Transcript of Proceedings—June 11, 1963

Place: Los Angeles, California.

* * * * * * *

[fol. 1595] OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

Mr. Coyle: Your Honor, this case is brought under Section 7 of the Clayton Act. This is a case filed under the amended Clayton Act, under the merits of the Brown Shoe case——

The Court: You will have to speak louder, counsel.

Mr. Coyle: In the Brown Shoe case, your Honor——

The Court: Why don't you lift the mike just a little, that will probably help.

Mr. Coyle: In the Brown Shoe case, your Honor, the situation involved a horizontal acquisition by Brown of the Kinney chain of retail shoe stores. Brown also had retail shoe stores in various cities.

The court found in that case that Brown's acquisition of the retail shoe stores in these various cities violated the amended Section 7. In these cities the market share of Brown and the market share of Kinney, in most of the cities, was over 5 per cent of the total market. Brown Shoes was very, very popular.

The Court: That was on a national basis, wasn't it, counsel?

[fol. 1596] Mr. Coyle: No, your Honor, on a city-by-city basis, your Honor, it was based on a city-by-city basis.

The Court: You mean that the Supreme Court held in the case that they broke down to each city?

Mr. Coyle: Yes, Your Honor, they broke it down to

each city, and each city—presented statistics on a city basis and held that each city——

The Court: What was the section involved?

Mr. Coyle: Each city involved in the section—there were some 112 cities involved. And each city was held to be a separate section.

The Court: Well, I haven't seen the law, or the court's findings, other than those indicated from the Supreme Court, and sometimes some relevant parts are left out.

But did the lower court make a finding on each city?

Mr. Coyle: Yes, your Honor.

The Court: It did?

Mr. Coyle: We submitted statistics on a city-by-city basis——

The Court: No, but did the lower court actually find the city-by-city——

Mr. Coyle: Yes, they found each city was a section of the [fol. 1597] country. It didn't make findings on each city, but it found that each city was a relevant section of the country. And then the findings, the Supreme Court then, from our exhibits, in its appendix made findings on each independent city, those findings are in the opinion of the Supreme Court, the Supreme Court found the market shares in each city——

The Court: That they did, I understand. But what I mean is, does the case hold that—in other words, there are 110, I think it was, 110 different areas or sections where there was a lessening of competition.

Mr. Coyle: That is right.

The Court: Substantial lessening of competition.

Mr. Coyle: The wording of the statute was that it may be a lessening of competition.

The Court: That's right. But did they make a finding as a whole?

Mr. Coyle: As to each city, your Honor.

The Court: The lower court made a finding as to each city?

Mr. Coyle: The lower court made a finding that each city was a section of the country and in each city there may be a tendency toward a monoply——

The Court: Then you contend that the Supreme Court, the Brown Shoe case is actually a decision on city-by-city.

[fol. 1598] Mr. Coyle: Yes, your Honor. I don't see how you can read it any other way.

The Court: Do you disagree with that, counsel?

Mr. Coyle: That is a difficult question, your Honor. I agree that as to competition on the horizontal level, horizontal retail level, they found a violation city-by-city.

The important thing there, your Honor, was Brown was an integrated national chain with both manufacturing and retail outlets.

And the evidence showed—and Kinney was a manufacturer, too—and the amalgamation of the manufacturing concerns of Kinney and Brown was held not to violate the Act. And the government never appealed that. The Court——

The Court: State that again, please.

Mr. Alsup: Kinney was a manufacturer of shoes, as well as a retailer. Brown was a national manufacturer.

The Court: As well as a retailer.

Mr. Alsup: As well as a retailer. It acquired Kinney.

The government charged the acquisition of the Kinney manufacturing plant violated Section 7. They lost in the trial court.

The Court: That is correct, that is correct.

Mr. Alsup: And they did not appeal.

[fol. 1599] The court found that from the vertical standpoint, because of the great control that a national manufacturer could exercise on the retail level, foreclosing other manufacturers from these thousands of retail stores, this merger violated the law.

It also found that competition on the retail level had been lessened and violated the Act in each of these cities because, being a large national manufacturer, it could enable its local retail outlets to sell at lesser prices than competing independent retail retail outlets not affiliated with the national chain.

The Court: What I am trying to bring, out, and for the purpose of educating myself, is whether or not the national situation was the dominant motivating pulse of that case, or whether it was just the city-by-city that was the pulse of that case.

Mr. Alsup: Well, your Honor, I can say that any answer to that, I think it is perfectly apparent the dominant na-

tional aspect of it was the dominating reason behind the decision.

The Supreme Court talks about tendencies toward concentrations such as were being accelerated by giant corporations moving across a hundred cities with giant strides. It is entirely different.

Mr. Coyle: I couldn't——

[fol. 1600] The Court: All right, Mr. Coyle.

Mr. Coyle: I couldn't disagree with anybody more than I disagree with Mr. Alsup.

The Supreme Court's opinion is clearly broken down into two phases, the vertical phase and the horizontal phase. And the Supreme Court treats them entirely differently.

When the Supreme Court gets to the horizontal phase, it makes specific findings that a city can be a relevant section of the country and a——

The Court: I don't think there is any dispute about that, counsel.

Mr. Coyle: And that the relevant section of the country in that case was these individual cities. In an industry that controls a substantial share of the trade in a city, it may have an important effect on competition, and an industry as fragmented as shoe retailing and controlling a substantial share of the trade in the city—that is the heart of the Brown Shoe case.

Firms operating on a city-by-city basis, you take a city and look at the effect on that city, and forget about the rest of the country.

The Court: Well, may I ask you a question. It may sound a little bit absurd on its face, but sometimes it brings a point out.

Suppose two grocery stores are competing, one on [fol. 1601] the northwest corner and one on the southeast corner in Los Angeles. And one goes to one and says to the other, "I will buy you out."

Mr. Coyle: Yes.

The Court: Now, that does substantially lessen competition in that area, doesn't it?

Mr. Coyle: They don't have a substantial share of the market in the Los Angeles Metropolitan Area.

The Court: So you are basing it on the share of the market area, is that what you are doing?

Mr. Coyle: Share of the market area measured against

the degree of fragmentation in the market area. In other words, in some market areas in some lines of commerce the combined percentage was about 5 per cent—as we have in Brown Shoe—but in a fragmented industry such as the shoe industry or the grocery retail industry, four or five per cent would be substantial because so much of the industry would be fragmented, and four or five per cent would have more importance in a fragmented industry than a concentrated industry.

The Court: I take it you are contending that the competition in Los Angeles County—or rather I had better call call this Metropolitan Los Angeles.

Mr. Coyle: Yes.

The Court: —is deteriorating.

[fol. 1602] Mr. Coyle: Our position is that the Los Angeles Metropolitan Area—and I think it is clear just to look around—is slowly becoming more concentrated. In other words, the chains are getting——

The Court: You mean the competition is becoming more concentrated, or the lack of it?

Mr. Coyle: The market share of the larger chains in the Los Angeles Metropolitan Area is increasing with the loss of the independents in the Los Angeles Metropolitan Area which is slowly dying out.

This is the big preface of amended Section 7 as interpreted by Brown Shoe, to preserve an economy where you have independents. And the Los Angeles Metropolitan Area where you see the eight largest chains have increased the market share over the years to the 12 largest chains which are accounting for a larger and larger percentage of the total grocery store sales in this area, and the independents are slowly dying out.

And these acquisitions accelerate that trend towards increasing dominance by the larger chains.

And that is what the Supreme Court, that is what the statute means when it says to substantially lessen competition or tend to create a monopoly.

Now, in the Brown Shoe there was much evidence presented by the defendants proving that competition—that [fol. 1603] the competition that the independents faced was even more vigorous than it ever was. There was ever-increasing vigorous competition in the Brown Shoe. And

the Supreme Court said that is not material when you have fragmented industry.

The Court: What does fragmented mean? I have no idea what it means. What does it mean? I am not up in that higher echelon of learning. What does that mean?

Mr. Coyle: Well, it is the court's words, your Honor.

The Court: I don't understand it. What does it mean?

Mr. Coyle: It means when you have an industry made up of a large number of independent firms, and that industry is moving towards increasing competition, competition concentration, and you have chains coming in, chains going up and the market shares of a few leading chains are increasing and the independents are going out. That is a fragmented industry tending towards concentration.

That is exactly what we have in the shoe industry and the——

The Court: Well, counsel, what about this, suppose the—assuming just for the purpose of argument the building by Safeway, by Ralph's, and these different stores, there is no prohibition against them building on every corner [fol. 1604] in Los Angeles, is there?

Mr. Coyle: That is correct, your Honor. And again in the Brown Shoe, there the distinction is made between natural growth and growth by acquisition. The statute just covers growth by acquisition but not natural growth.

The Court: I see.

Mr. Coyle: Because under the theory that the natural growth adds something to the economy, it adds new jobs, new addresses, new businesses——

The Court: Well, the whole problem in this case is then that every purchase or acquisition of assets or the purchase of stock does to some extent lessen the competition, is that right?

Mr. Coyle: I wouldn't say every one; many of them do.

The Court: Well, which ones wouldn't? Suppose anybody purchases—suppose any concern here in the city purchases the assets of another small group of, say, 10 stores.

Mr. Coyle: You mean if they are in the same line of commerce?

The Court: Of course. We are assuming that throughout this discussion.

Mr. Coyle: Then every one of them would tend to increase the concentration.

[fol. 1605] The Court: So that would lessen the competition, is that right?

Mr. Coyle: That's right. And——

The Court: That is according to your theory.

Mr. Coyle: It would tend to create a monopoly—but that again——

The Court: Now let's don't talk about monopolies. We are dealing now at the moment with "may substantially lessen competition." And what I am trying to find out, to get your position, is that it finally comes down to what is substantial. Isn't that right?

Mr. Coyle: Well, it comes down to whether in terms of a particular market, the two items which are merging or being acquired are substantial in terms of that market.

And the other consideration would be whether that market is tending towards concentration.

In other words, if that acquisition took place in a market that was tending away from competition, then perhaps it would not be substantial. But when you have an acquisition involving an industry where you have a definite tendency towards more and more dominance by a few large chains——

The Court: Either by acquisition or by natural building?

Mr. Coyle: That is correct, your Honor. There is [fol. 1606] one case, the American Crystal Sugar case, where there was a quota system that was really holding down new entrants into the industry. In that case the court said that even there the acquisition would be judged against this background where there were no new entries into the field.

Now this quota system, even in that case an acquisition between two substantial firms violated many sections of the Act.

The Court: In other words, what you are saying is that the defendants in this case are affected in the determination of what is substantial by what Safeway is doing, what Ralph's is doing, and what A. & P. and the other stores are doing, is that what you are saying?

Mr. Coyle: I am saying, your Honor, that the acquisition

is measured against the general background of the industry structure and——

The Court: Well, doesn't it amount to simply this: That Safeway and Ralph's stores, and Alpha Beta and all the different stores are putting on—Food Giant, Mayfair, are putting on a campaign to add stores? That that, under your contention, brings up the question that this in itself will help to increase the so-called substantially lessening of competition?

Mr. Coyle: That is correct, your Honor. But I might point out that in this area the chains that have made [fol. 1607] acquisitions have increased the market share. As a matter of fact, Safeway has lost market share over the years. And Safeway has made no acquisition of market shares.

The Court: Well, they have built stores, haven't they?

Mr. Coyle: But they haven't kept pace with the growth of the population.

The Court: Well, I don't know whether that is economic or whether it is competition or what. You say—you mean in volume of business, or number of stores?

Mr. Coyle: In percentage of markets, your Honor.

The Court: Well, what is percentage of markets? You mean the volume?

Mr. Coyle: Volume is the percentage of total customers in this area.

The Court: Well, how about the number of stores?

Mr. Coyle: The number of stores has declined, but their dollar volume has gone up.

The Court: I see. How about Ralph's?

Mr. Coyle: Ralph's, I think the number of stores has stayed about the same. The dollar volume has gone up. Their market share has remained about the same.

The Court: Who, by the way, has the largest number of stores in this Metropolitan Area?

Mr. Coyle: I feel it is probably Safeway. Safe- [fol. 1608] way has a lot of stores, although Safeway has been closing small stores and opening large stores. Safeway has about the same volume of sales as combined Von's and Shopping Bag.

The Court: Now, the evidence that will be in the record

will fully disclose, not only the volume of business but the number of stores, is that correct?

Mr. Coyle: That is correct, your Honor.

The Court: All right. I hope this interruption doesn't interfere with your presentation, does it, counsel?

Mr. Coyle: Not at all, your Honor.

As I said, we have followed the approach of the Brown Shoe case. The first point that Brown Shoe makes is that in examining a relevant market you consider the structure, history and probable future.

And our examination of this structure of this industry indicates that in 1956 there were many more grocery stores in this area than there are today. The total number has declined by about 1700, between 1956 and today.

The Court: Many of them went through bankruptcy, too, didn't they?

Mr. Coyle: That is correct, your Honor.

The Court: Because of inefficient management.

Mr. Coyle: There are any number of causes, but there are just fewer stores in this area.

The Court: How many, by the way, have been through [fol. 1609] receivership? Will the evidence show how many?

Mr. Coyle: The evidence won't show that, your Honor. It was quite a task to even get the actual total number of stores, as far as that is concerned.

The Court: What is that?

Mr. Coyle: It was quite a job to even get an accounting of the total number of stores. We had to—we finally went to the State Board of Equalization to get that count.

The Court: Well, I was wondering, though—of course it is up to you to try your own case and up to defense counsel to try his case, or their case. But I was wondering if it is relevant to show how many of these chains have more or less folded up through lack of enterprise. I know there have been some, I know some myself.

Mr. Coyle: Yes, your Honor. Some folded, there is no question of that, that some of them folded. I thought your Honor meant a count as to all 1700 stores.

The Court: No, I mean for example Fox.

Mr. Coyle: We all know about Fox.

The Court: Fox, and then I think there were some others.

Mr. Coyle: McDaniels.

The Court: There is no question some of them folded up.

[fol. 1610] Mr. Coyle: Yes.

The Court: Well, I know that.

Mr. Coyle: Of course, I don't think Fox folded up, Fox got into trouble and was acquired by a large eastern chain.

The Court: All right. Go ahead.

Mr. Coyle: We also, I believe, intend to demonstrate that the large chains have definite competitive advantages over independent groceries. And the independent grocery finds it increasingly more difficult to compete against the large chains in this area.

And this probably is true in other fields and other areas. But the purpose of the amended Section 7 was to keep the independent as a part of the American economy. That is definitely the purpose, one of the purposes Congress had in mind when it passed the Act.

The Court: Whether it is efficient or not.

Mr. Coyle: Yes, your Honor.

The Court: In other words, if a person can't do the job, you will keep him on the job, feed him coffee and give him coffee breaks?

Mr. Coyle: No, your Honor. But this won't justify mergers just because it is more efficient. The Supreme Court says so definitely on that in Brown Shoe. Congress appreciated that. Congress appreciated the case of [fol. 1611] higher costs might result in difficulties. You resolve these competing considerations in favor of decentralization. We must give effect to that.

The Court: Where did they find that in here?

Mr. Coyle: The Supreme Court.

The Court: Just because the Supreme Court says it doesn't make it true. Where did they find it? That is what I mean. The Supreme Court says a great many things that I have looked for to find a substantiation, and don't find it.

Mr. Coyle: On page 344——

The Court: They say that, yes. But what do they base that on?

Mr. Coyle: They base it on the fact that they say further

by eliminating wholesalers large chains can market their own brands at prices lower than those of competing retailers. And Congress appreciated this, that this might result in——

The Court: Well, I know they say that, but were there some hearings or something where——

Mr. Coyle: We had a trial for that, we had a trial——

The Court: I am talking about Congress, in the Congress where in the hearings.

Mr. Coyle: Committee hearings.

The Court: Committee hearings?

[fol. 1612] Mr. Coyle: Yes, your Honor.

The Court: They said that in the hearings.

Mr. Coyle: Yes, your Honor.

The Court: I see. Because there are though, you know, or sometimes even an article may not have the facts.

Mr. Coyle: Yes, your Honor. But the hearings were clear on that, the hearings were clear, the committee hearings with the House and Senate——

The Court: Mr. Justice Jackson, you read his opinion about what the value of considering the hearings in Congress is. I take it you have read that opinion.

Mr. Coyle: I know the one you are referring to, your Honor.

The Court: I suppose it is all right to refer to that.

Mr. Coyle: Yes, your Honor.

To get back to——

The Court: It seems to me that what you are coming down to all the time, you are bringing yourself right down to one proposition, and that is: What does "substantially lessening competition" mean?

Mr. Coyle: Your Honor, there are two purposes, one is it tends to create a monopoly, whether it is read together or whether it is read in the disjunctive.

[fol. 1613] The Court: Now, are you serious about creating a monopoly in this case?

Mr. Coyle: Yes, of course.

The Court: You are, really?

Mr. Coyle: That is what the Brown Shoe turned on, your Honor, a tendency towards——

The Court: Yes, but this was a national situation where it covered the entire United States.

Mr. Coyle: The Act applies to individual sections of the country and the percentages here are much larger than the actual percentages were in the Brown Shoe.

The Court: In other words, you think that Safeway, Ralph's, A. & P., all these stores are going to sit by and see Von's Market become a monopoly in this area?

Mr. Coyle: If your Honor please, Brown Shoe, as I read it—and I think I read it correctly, I spent about five years of my life trying the darn case—if I read the Brown Shoe case correctly, Brown Shoe means that a tendency toward increasing concentration is all the government proves, if the government doesn't prove that monopoly is right at the doorstep in the shoe industry, 24 concerns control about 35 per cent of the shoe production in the United States.

And the Supreme Court and the lower court there found that there was this tendency toward increased concentration brought about by the acquisition of——

[fol. 1614] The Court: In other words, you say just the tendency is enough.

Mr. Coyle: There is no doubt about that, no doubt about that. That is the language of the Act. The Act doesn't rule out competition. The language of the Act is where the effect may be to substantially lessen competition or tend to create a monopoly.

The Court: Well, go ahead.

Mr. Coyle: As I said, in Brown Shoe, in establishing that the industry was fragmented, the court then went on to say that—I read it before—and industry is fragmented that controls a substantial share of trade in the city and may have an important effect on competition.

So they used that word "may."

And then they went on to say that they might be required to approve future merger efforts on the part of Brown. And that is the part of the Brown Shoe holding as it relates to the horizontal effect of the acquisition.

When you have a fragmented industry and a tendency toward concentration and definable market area, then an acquisition involving a 5 per cent control may have these effects. And that is the test.

The Court: One-tenth of one per cent may have.

Mr. Coyle: Well, the Supreme Court did not say that,

it said 5 per cent control, 5 per cent control and de-
[fol. 1615] pendent upon the degree of concentration and fragmentation in the industry.

The Court: Well, that is always the problem, when you start laying down rules and regulations to cover everything, you find, if you have any experience, that you have problems. But of course some of our courts have not had too much business experience and so they have no problems about laying down rules.

But when it comes to applying the rules, then we have problems.

And that is the problem I can see in this case, is where is this line?

After reading over all of this material, I am concerned. Where is the line?

Is it for one judge to say where the line is? I guess that is what it is coming to.

Mr. Coyle: Well, I think, your Honor——

The Court: Subject to appeal, of course.

Mr. Coyle: I think this case is so much like the Brown Shoe, if the opinion in Brown Shoe means anything, I don't see how the facts in this case can in any way be distinguished from the horizontal facts in the Brown Shoe.

The Court: I wouldn't, if I were you, go too far in assuming that, because my mind is open.

Mr. Coyle: Yes, your Honor, I am aware of that.

[fol. 1616] Now, in Brown Shoe defendants pointed to the fact that there were 70,000 retail store outlets operating in the United States. And if Brown introduced much evidence as to increased discount houses and these other things, there is no doubt that competition was vigorous in every sense.

We presented testimony that they were having a more difficult time staying in business because competition kept getting harder and harder as far as he was concerned.

Brown made a strong argument that the remaining vigor of competition justified this acquisition.

In rejecting that the Supreme Court used this language:

> "Brown's argument, however, that the shoe industry is at present a large number of manufacturers or retailers and that the industry is dynamically competi-

tive. But the remaining vigor cannot immunize a merger if the trend in that industry is toward oligarchy * * * "

The Court: Those are words, semantics. I don't know what it means, except generalization, that is what it is. It is the Supreme Court speaking, but it is still generalization.

Mr. Coyle: It certainly means if there is a trend towards concentration, the remaining vigor——

The Court: Everything tends that way, that is the [fol. 1617] problem, counsel.

Mr. Coyle: That is the problem——

The Court: Everything tends towards concentration. For example, let me ask you, what Standard Oil Company that took over the—was it Standard of Ohio that Standard of California acquired?

Mr. Alsup: Standard of California, your Honor.

The Court: Now does that tend in any way to lessen competition?

Mr. Coyle: I don't know who they took over, I am not familiar with that.

The Court: Well, it happened right here in America, it was in every newspaper in the land. And this is one of the largest corporations in the world, acquiring another corporation—was it Standard of Ohio?

Mr. Alsup: Standard of Kentucky, your Honor.

The Court: Standard of Kentucky. That is right, Standard of Kentucky.

Mr. Coyle: I don't know whether they were operating in the same market areas——

The Court: Now that is the reason I asked you the question. The same market area, according to your interpretation of the Supreme Court, means within the whole Metropolitan Area of Los Angeles, is that right?

Mr. Coyle: That is correct, your Honor.

[fol. 1618] The Court: Now let us assume for the purpose of discussion that one group of stores was operating in Anaheim, Santa Ana, Long Beach. And the other is in Beverly Hills, Malibu and the Valley.

According to your interpretation they are in competition with each other?

Mr. Coyle: Your Honor, we stipulated in the pretrial conference order that the 20 leading chains in this area included the defendants, the two defendants competed intensively with each other prior to the Act.

The Court: I was rather surprised at that statement, frankly. But it is in the pretrial order, I know that.

Mr. Coyle: Now, your Honor, you are talking about a chain of three stores up in the Northeast and a chain of three in the Southwest. Then I would say that, they may be in the same market area, but they are not competing, they would not be a substantial factor in this market area.

The Court: Well, I am asking the line. You know, if there are 50 stores operating in, say, Wilmington, Long Beach, Santa Ana. And then there are 50 stores of another concern operating in Malibu, Beverly Hills, North Hollywood and Van Nuys, under this stipulation in the pretrial agreement they are in competition with each other because they are all in competition with the whole.

Mr. Coyle: If they are among the 20 leading [fol. 1619] chains—I don't think you will find any of the 20 leading chains that isolated——

The Court: Well, I am using that as a hypothetical to try to find out the meaning of the Brown Shoe case. I have read it completely, I have read the Brown Shoe case and I am frank to say that I don't fully comprehend it. It has too great a depth for my understanding. And I have got to learn it, I have got to figure out what has been said and what is to be done. Because if I read the case right, in one reading no acquisition of anything can happen in an area without lessening competition.

And then the question is: May it substantially lessen competition? If so, it is illegal.

Mr. Coyle: That's right.

The Court: So this is just about the end—this is a new social order we are coming to. That is what it is.

Mr. Coyle: Your Honor, there is no doubt when Congress passed that Act they wanted to stop the acquisition of——

The Court: I have no doubt of that, but whether they wanted to go that far or not I don't know. I am just wondering if it was intended that—if it was intended to go that far.

Mr. Coyle: I don't believe that this is an extreme

situation here where you have the Metropolitan Area [fol. 1620] that has a larger population than 11 states and the District of Columbia. These are not small potatoes, both of these companies are larger than Kinney Company, the company that was acquired by Brown Shoe, much larger.

The Court: I don't think that is the answer, counsel, necessarily.

What I am getting at is—and I think you have answered me—and that is the competition in the area. Never mind taking the competition of the individual into consideration. Is that what you are saying?

Mr. Coyle: I don't understand.

The Court: Well, A and B are competing with each other as stores, each of them has 50 stores in a different part of this area, Metropolitan Los Angeles. They are not competing with each other at all.

Mr. Coyle: There is no question that the tests, and the committee reports say this, the Brown Shoe opinion says this, and I think counsel agree with me, the test is the elimination of competition between the acquiring and the acquired. The test is the general lessening of competition, or tendency toward a monopoly which may result from the merger in the entire relevant section of the country.

The Court: Well, let's suppose just for the purpose of discussing this case before we get started—suppose there [fol. 1621] is a concern out here who is doing fairly well, has, say, 50 stores and is struggling to keep going, having its problems.

Now, it is acquired by another concern who has better management, better financing better stability, and a better record of operation.

And they bring those two together and a new management takes over and gives a stiffer competition by reason of its acquisition.

Now what is your answer, is that lessening competition or is that increasing competition?

Mr. Coyle: Well, if it were in this particular market area, that would tend to lessen competition.

The Court: Why?

Mr. Coyle: Because the new firm would be part of this

tendency toward increasing concentration in the market area.

It is not a question of day-to-day competition, it is the long-range drift in the market area toward heavier concentration and toward monopoly.

The Court: Now you are changing your ground a little, you are saying now it is concentration, whether there is substantial lessening of competition or not.

Mr. Coyle: No, your Honor——

The Court: Suppose it increases competition before the next 50 years.

[fol. 1622] Mr. Coyle: Well, I can't predict how long it would increase competition, but competition is always increased prior to, in a fragmented industry, these moves toward concentration.

The Court: You, of course, are assuming—I guess we all have to assume, although I wouldn't do it personally, they all are assuming that we are headed for a new plateau of prosperity and we are goingto be up on that high plateau, there was this prediction in 1929, so that everybody will be riding bicycles with wings on them, economically speaking.

But no account is taken into consideration of the prospective economy of the country when you decide these cases. It is completely disregarded and ignored. No consideration is given to the whole history of America economically as to what has happened.

I take it we must assume there will never be another valley, we will always live in the hills from now on.

Mr. Coyle: I think we assume that Congress takes those things into consideration.

The Court: Well, Congress will find out they are wrong about that. They will find out that there are hills and valleys in this life, they will learn that. It is only inexperienced people who don't know that.

So I take it I am not to consider any of the [fol. 1623] economic trends at all in this case.

Mr. Coyle: I think your Honor is to consider the market structure.

The Court: Just the market structure?

Mr. Coyle: Market structure and the importance of these two defendants in the market structure.

The Court: I see.

Mr. Coyle: And the probable history in that market structure.

The Court: Well, how about the future, though? Am I to contemplate, from the evidence, what effect this is going to have in the future? I have to, do I not?

Mr. Coyle: I don't think that you can look at this market structure and not contemplate that there is going to be more concentration of the market structure. I think that is as clear as can be, that chains will be coming in and other chains closing, and announce they are going to buy out the Market Basket, Alpha Beta, and different——

The Court: Are they in court, too?

Mr. Coyle: They are under investigation, your Honor.

The Court: Don't let them get around before I am dead and gone.

Mr. Coyle: I wouldn't say that, your Honor.

The Court: That kind of investigation will last [fol. 1624] several years, won't it?

Mr. Coyle: I wouldn't say that, your Honor.

The Court: Well, all right. I think we had better give the reporter a little relief here. It is five after 11:00.

I am discussing this in this fashion with you, it is my purpose to try to bring out your thinking, counsel. Don't assume anything at all from what I have said. I have reached no conclusion.

But I like to probe, inquire and learn. And it may be that you will teach me that your case is a bad case, or the other counsel may teach me his case is a bad case—if they use the patent language, the teaching. Sometimes I wonder if it should be taught.

But at any rate I find that ofttimes that counsel who are presenting the argument wins the case for the other side. So be careful. That is what I have in mind.

We will stand in recess for 10 minutes.

(Short recess.)

The Court: All right, Mr. Coyle, continue.

You know, I just want to tell you this: The reason I made the remark, I only had three perfect cases in my life and I lost all three of them. So don't start out on the assumption that this is a perfect case. You might run into the same thing, the same experience that I had.

[fol. 1625] Mr. Coyle: I have never had a perfect case, your Honor.

The Court: All right. Well, we got that much of a concession out of you, didn't we?

Mr. Coyle: This is one of the better ones, your Honor.

The Court: All right.

Mr. Coyle: I think I can close by saying that the remaining vigor of competition is in danger in the same section where you have this trend toward increased concentration and you have a merger of two firms which are substantial factors in competition in the particular relevant market area.

The Court: But you are sort of running, sort of stepping stones on me, aren't you, counsel? One moment you are saying, as I understood you, it may tend to substantially lessen competition or tend to create a monopoly, that that is the case.

Mr. Coyle: That is what the Act says, your Honor.

The Court: Now, then, I was asking you that if it not only didn't decrease competition, it increased it in the area, what your answer was.

Now, I think you are moving over to say, "Don't pay any attention to that."

[fol. 1626] Mr. Coyle: I think what I meant to say, your Honor, is that the court doesn't look at the—or the Act doesn't require it to look at the short range effect of the consolidation or the acquisition.

The Court: By short range, what do you mean?

Mr. Coyle: Well, I mean that you might have an industry composed of, say, 25 firms, five of whom are large and 20 of which were very small.

And you might have a merger between two of the top five, and they might get very strong and competition might increase immensely in that industry for a limited period of time.

But as a result of that increased competition, the 20 little fellows would go out of business, and ultimately in the long range when you have these cumulative effects, they do have a short term increase of competition. But then the net result is that the tendency is to wipe out more of the little fellows.

The Court: That is where the problem, one of the prob-

lems comes in, doesn't it, trying to divine the ultimate effect.

Mr. Coyle: That is the basic issue in all of these cases. But I think that the Supreme Court and the legislative history points to the way to divine it. When you do have a [fol. 1627] substantial firm in a substantial segment of the economy merging, and when that segment of the economy is tending toward increased concentration, and that is where Congress meant to draw the line so that these firms don't merge.

The Court: But, counsel, that is the point I am afraid I am not getting over to you, and that is that that is happening all over the world, and particularly in America today in every locality all over this country. There is a continual increase.

And if I adopt that premise, then no merger would be possible.

Mr. Coyle: I wouldn't say no merger, your Honor, but this merger would not be.

The Court: Well, it practically comes down, in one facet of the argument, to the proposition that if you carry it to its ultimate or reduce it to its lowest common denominator let's put it that way—that no merger could take place.

Mr. Coyle: I think that Congress didn't mean that no merger would take place. When you have this horizontal situation, when you have a horizontal market and you have two firms merging, and it is clear that Congress says that you do apply the rule of reason, that rule of reason of the Sherman Act——

The Court: I think the case clearly says that, [fol. 1628] yes.

Mr. Coyle: So if you don't apply this test that I believe the Supreme Court applied, I am hard pressed to know what test you do apply, when you have two competitors merging, if you have to prove that the test—or that the merger was unreasonable, the test can't be that the public interest would be injured, because you are back to the legislative function, if you get to that.

And I believe the only practical test is that you look at this industry and see whether these are substantial firms in that industry.

The Court: It isn't that simple, though, whether they are substantial. "Substantial" is a rather big word.

Mr. Coyle: Well, your Honor——

The Court: For example, let me ask you this, counsel—just again by way of discussion—suppose a concern is in bad condition, it feels itself slipping, substantially slipping economically, losing its grasp, not being able to come to grips with the market as it exists. Now, the management says, "We have got to do something."

Now, in order to save that business they go to another concern who is in the same line. And they say, "How about acquiring you?" And they do. Now, let's assume for the purpose of discussion, that this weak company was on the road to the rocks, going down.

[fol. 1629] Now, if by saving that company and creating additional competition through the use of those facilities, what is our answer? Is that a substantial lessening over a period of time, is that to be disregarded, the immediate effect to be disregarded? Is that what you said?

Mr. Coyle: No, your Honor. There is a clear exception in the International Shoe case to take care of situations where the firm is faced with imminent bankruptcy and there is no other available purchaser other than a competitor.

The Court: But, counsel, the trouble with the courts is they don't have any experience. They don't understand—facing bankruptcy is a thing of degree. A man may be riding in a Rolls Royce one morning and have all the appearances of success, and the next day he may be in the prisoner's dock for debt. So——

Mr. Coyle: There is no question, your Honor——

The Court: So when is a concern in that condition? That is the problem.

Mr. Coyle: There is no question, your Honor, but what every acquisition, every consolidation results from the best of business motives, and there is no question but that——

The Court: Well, I wouldn't go so far as to say that——

Mr. Coyle: Most every one, most every one. And [fol. 1630] in most of them the debtors and the president and the officials of the concern that is being acquired, they do believe that it is in the best interests of their company and their stockholders for them to sell out.

But you can't make that test, because that would legalize virtually every act——

The Court: No, I am not asking you that. I am asking you what is the effect, suppose the evidence in this case indicates that one of the situations was that they knew that they were slipping, going down.

Mr. Coyle: Well, this is——

The Court: Does the court consider that fact?

Mr. Coyle: The answer to that is that they should go out and do something about their problem themselves, if they couldn't——

The Court: Oh, counsel, I don't know what that does. It goes beyond begging the question.

In other words, if you are failing you should go out and adjust yourself, become successful. It is not that easy. Life isn't that simple.

Have you ever run a business?

Mr. Coyle: At one time, your Honor.

The Court: Well, maybe that is the reason you are with the government now, I don't know, because business—for example, I remember a business that I started out in and [fol. 1631] put someone in and we had a net the first year of $27,000.00. The second year, after I left it in his hands, we had a net loss of $30,000.00, because he said the location was bad. It is strange that a location can change overnight. But the trouble is management, it is management. There is no substitute for management.

And this is the thing we overlook, I am afraid, in some of these cases.

Am I to consider these questions, though? That is what I am asking you.

Mr. Coyle: My judgment, your Honor, is that you can consider only the—you don't go into these management problems because the Act would be meaningless if every case——

The Court: Well, what we are coming to, we are going to equalize everybody. In other words, this is the ultimate socialistic system to make everybody equal; in other words, everybody is to be inefficient——

Mr. Coyle: It is the basic trend that business is to grow on its steam, they go out, they expand——

The Court: But they grow and some of them die, counsel,

some of them die and they don't die overnight. They die gradually. They get sick and they die slowly.

Now it is those factors that you say cannot be considered.

Mr. Coyle: Your Honor, the exception is of [fol. 1632] course, the International Shoe exception, other than that, for business motives, they can't possibly——

The Court: I am not talking about motives, I am talking about conditions, never mind motives. I am talking about the condition that exists.

Mr. Coyle: Talking about the consideration.

The Court: I am talking about the fact that—let's say 50 stores, or a hundred stores are about to go out of existence.

Mr. Coyle: That isn't the situation we have here——

The Court: I am not saying it is. I am discussing with you principles. I am trying to develop principles of law.

Let's say that a hundred stores are in such a situation they are about to go out of business because of bad management and whatnot.

Mr. Coyle: Then they would qualify under the International Shoe doctrine.

The Court: All right. Then they don't have to be in bankruptcy, they don't have to be in receivership, is that correct?

[fol. 1633] Mr. Coyle: Well, the language is pretty clear, I think, in the case——

The Court: Yes, I have the case. Pass it over to him, Mr. Clerk. But I want the book back.

Mr. Coyle: I meant the International Shoe case.

The Court: My experience with the Government is that we don't always get our books back.

Mr. Coyle: I meant the International Shoe case, your Honor, not the——

The Court: Oh, I thought you wanted the Brown Shoe case. That is all right.

Go ahead, counsel. But you see the point I am driving at.

Mr. Coyle: Yes.

The Court: I am trying to find out——

Mr. Coyle: I think that is correct, your Honor, that International Shoe did not make the exception of this case where the firm is hopelessly insolvent, your Honor.

The Court: Does it have to be hopelessly insolvent?

Mr. Coyle: Let me get the language of the case here.

The Court: In other words, you must wait until you are lingering on your deathbed before you do anything?

Mr. Coyle: Your Honor, it says:

> [fol. 1634] "The evidence establishes the case of a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers fairly concluded was a more disastrous fate * * *"

That is 280 U.S. 291, page 301.

The Court: That is cited in your memorandum?

Mr. Coyle: Yes, your Honor. And then it says:

> ". . . a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure * * * (there being no other prospective purchaser) * * *"

The Court: That is the trouble again with generalities and adjectives. A person who speaks in adjectives doesn't realize the complications of the everyday business man.

In other words, I from experience, represented a client. He was warned to get out of the business, he lingered with it for ten years and he lost about ten million dollars. He ended up and died broke.

Now he lingered on and fought on. But there was a time when all the people around him told him that he had to do something.

[fol. 1635] Now the way you read that case is that he has got to wait until the lingering sickness takes place, to wit: The verge of bankruptcy, before these considerations can be taken into account. Is that right?

Mr. Coyle: Your Honor, I don't think we are talking about small corporations here anyway. It is not like——

The Court: Big corporations go broke, too, you know. I remember when Swift—was it Swift or Armour lost a million dollars a day for 90 days.

Mr. Coyle: Yes, your Honor. But I think that they

should certainly exhaust all other alternatives before they get the green light to go——

The Court: Now you have moved over into that situation that they first must exhaust other alternatives before they use this method. Is that what you are saying?

Mr. Coyle: I think that is obvious.

The Court: I see. All right. Well, I am following you now.

Mr. Coyle: If they exhaust the other alternative then I suppose they would qualify under the International——

The Court: What other alternatives?

Mr. Coyle: In this situation——

The Court: What other alternatives are there that you are speaking about where this person, where this concern—let's say a concern is going down in business, losing business.

[fol. 1636] For example, I take it that the general run in the grocery business, 1½ per cent on the sales is a pretty good ratio, isn't it?

Mr. Coyle: I would say that 1 per cent on sales is.

The Court: Well, if you do a hundred million dollars in business with a million-dollar net profit you have done well.

Mr. Coyle: I would think so, your Honor.

The Court: Now, if your volume drops 10 per cent, what is usually the ratio of drop in your net profits?

Mr. Coyle: I don't know, your Honor.

The Court: Well, here we are dealing with a great——

Mr. Coyle: All I know in this case is that neither of these concerns—both of these concerns were increasing their sales.

The Court: Counsel, some of the biggest business concerns in this country are increasing their sales and you had better get rid of their stock, if you have any. They are going up daily in their volume of sales and down daily in their net profits.

Mr. Coyle: Both of these firms have had respectable returns on their earnings——

The Court: What was the return, for example, of [fol. 1637] Shopping Bag for last year? What was the net on the sales?

Mr. Coyle: Before or after taxes, your Honor?

The Court: Was it 1 per cent?

Mr. Coyle: I think that was the strike year, your Honor, I have the exhibit here.

The Court: You say it was a strike year. One of the vagaries of business——

Mr. Alsup: Your Honor, I don't care to interrupt counsel but——

The Court: Yes, go ahead. What is it?

Mr. Alsup: They are set out on page 11 of our brief.

The Court: I know, but what was it, what was the last net?

Mr. Alsup: Shopping Bag had a net income of $770,-122.00, .9 per cent net income to total sales, and 3.2 per cent net income to total assets.

The Court: By total net income to total assets, what do you mean, net assets, what do you mean?

Mr. Alsup: Mr. Von der Ahe can explain this better than I can.

The Court: Well, can you, counsel? I don't quite understand—you can give it to me later. I have never heard that expression before.

Mr. Coyle: If your Honor please, I know this, that [fol. 1638] over a period of years they were making about 14 per cent on invested income, which sounds to me like a pretty good profit.

The Court: Now I don't understand what you mean by invested income.

Mr. Coyle: Let me see this exhibit a moment, your Honor.

The Court: You know, I have been around accountants for the last thirty years, in fact dealt with them almost entirely. And you are using terminology that I don't comprehend, "invested income."

Mr. Coyle: Invested capital, I am sorry.

The Court: Well, that is something different.

Mr. Coyle: That is Government's 28.

The Court: Well, what do you think General Motors is doing today on its original capital, invested capital?

Mr. Coyle: I have no idea, your Honor.

The Court: Probably 1000 per cent at least, counsel.

Mr. Coyle: Now this exhibit which we obtained, it is not in evidence, which we obtained from the defendants, indi-

cates that in 1958 Shopping Bag was earning 15.3 per cent of invested capital. And——

The Court: Of invested capital; what was the [fol. 1639] invested capital?

Mr. Coyle: This exhibit doesn't state what the invested capital was.

The Court: You know, I have a little investment that is earning—what is 10,000 times zero, what percentage is that?

Mr. Coyle: I am not sure, it was more than that on this invested capital.

The Court: I see. But I just happen to have one where I am getting very good earnings on it with no investment. What is the ratio of earnings? How do you figure it? The amount of capital is the important thing, isn't it, counsel?

Mr. Coyle: I would say so, your Honor.

The Court: This is an economic factor. If a man puts $10.00 into a business—for example, I think the name of the concern is, I am not sure about this and I don't want to make a mistake—but I think Canadian Investors, or some concern of a similar name, the stock was selling in 1949 at 50 cents a share. The last time I heard of it it was $2500.00 a share. So the company has done right well on a low capitalization. Maybe that is a monopoly, I don't know.

Mr. Coyle: It is not a monopoly, but it certainly doesn't indicate——

[fol. 1640] The Court: I mean the earnings on invested capital, I don't think means——

Mr. Coyle: With the earnings on sales——

The Court: That is something different, that is something different.

Mr. Coyle: But there again we have, it certainly depends upon the business you are in. And over the years the earnings on sales in any one particular year is not oftentimes indicative.

The Court: For example, what is the turnover in a grocery store or market?

Mr. Coyle: Well, I can tell you that right here on this exhibit of Shopping Bag. The Shopping Bag had twelve turnovers, inventory turnovers in a year.

The Court: That is what——

Mr. Alsup: May I inquire what exhibit you are referring to?

Mr. Coyle: This is Government's Exhibit 28.

The Court: Twelve turnovers in a year?

Mr. Coyle: Yes.

The Court: I see. Well, I think the hardware business turns about four and a half to five. And I guess the grocery business would run at least two and a half times.

Mr. Coyle: Yes.

The Court: So that sounds about right.

[fol. 1641] Mr. Coyle: Von's had a better turnover. They had 16.8 turnovers.

The Court: So theirs was probably a little higher.

Mr. Coyle: That is the reason their net income after taxes, as the margin of gross sales is, compared to gross sales was a little higher.

The Court: Yes, of coure. In other words, we are working today, in the markets today, in the market places they are talking about increased volume, increased volume, and make up by the volume for the reduction on the net, is that right? That is the talk of business today.

Yet we are now discussing the question of lessening, substantially lessening competition. In other words, the discount stores, everything is going on volume now, isn't that right?

Mr. Coyle: Yes, your Honor.

The Court: All right. Have you finished? With your argument, I mean.

Mr. Coyle: Well, your Honor, let me see what else I have here.

The Court: I can tell you this, counsel. Discussion is very helpful to me because, despite the fact that I have read the Brown Shoe case, and I have read your briefs, there is no substitute, in my opinion, for discussion. And [fol. 1642] that is the reason I use this method to try to bring out and clarify, bring out these things that you are thinking to help me clarify my thinking.

Mr. Coyle: Well, I might say——

The Court: So don't, as I say, don't assume anything from this discussion at all.

Mr. Coyle: To sum up, I might say this, your Honor, that as we view this case it involves a fragmented market

area, market structure heading toward concentration. It involves the consolidation of two oftheleading chains in that area.

They were leading chains by any number of measurements. Perhaps we have talked too much about percentages. Certainly percentages are only one measurement. Now, they are the first measurement.

Now, both of these chains have been increasing. Dollar sales over a period of years. They have both opened new stores.

The Court: And the population has been increasing in the Los Angeles metropolitan area.

Mr. Coyle: But they have grown faster than the population. They have increased their market sales. They both had been enjoying profits.

Now, Von's earnings on percentage of sales were higher than Shopping Bag's. We don't have any figures on how Shopping Bag compared with other firms. But I think [fol. 1643] anything around 1 per cent is respectable in the grocery industry.

Now, our stand on the Brown Shoe is that when you have that situation involving substantial firms and a substantial market area, now that may be a word that needs some clarification, but certainly I hink that this is a substantial market area, nobody could deny that.

The Court: Oh, there is no question about that, there is no question about that. I don't think that here will be any—here is no dispute about that.

Mr. Coyle: And there is no question that these were big, progressive firms in that area.

The Court: That I don't know how far counsel will go in saying they are big and strong. Big and strong is a distinction, a designation that leads to discussion of degree. So that is a thing that I have to determine, I guess.

Mr. Coyle: They were the third and fifth largest in the area, in terms of sales combined in, say—using the 1958, the 1958 figures they were the largest in the area. Using the 1959 and 1960 figures they were slightly smaller.

But they were right up there with Safeway combined, both during that whole period of time. But they were not as—they were not small potatoes, they were big firms measured against this entire area.

[fol. 1644] Now I think that the discussion here, I think the defendants' briefs indicate that they have two principal defenses. The first defense is that this merger can't possibly have an effect of tending to lessen competition and create a monopoly because there is still a lot of vigorous competition in the area.

We have to say categorically that the remaining vigor of competition is not a defense when you have this market situation and when you have firms of this magnitude.

The Court: Then, counsel, why have a trial?

Mr. Coyle: Well, your Honor—

The Court: Why not just adjudicate the matter, adjudicate the merger, just say, "Well, that is it."

Mr. Coyle: Well, I am sure that when Congress passed this Act they intended that many mergers would be stopped on that basis.

The Court: Well, it makes the court more or less an economic czar, it just turns the court, under this theory, into an economic czar. And it has the blood and life of these concerns in the hands of the judge. And most of these judges, I am not too sure have had very much experience in these kinds of things.

Mr. Coyle: Well, I think Congress intended to stop mergers, there is no question.

The Court: That is what you are saying, they are [fol. 1645] going to stop mergers, period.

Mr. Coyle: Between substantial firms which are substantial factors in the industry where you have a pronounced tendency toward consolidation and increase in concentration.

The Court: This is a delegation again of the power of Congress.

You know, in the old days a liberal was one who fought delegation of power. He believed in retaining the power of the people in Congress, not turning it over to the courts or the executives.

But apparently now the liberal is nothing but a disguised Tory who believes in turning over everything to the executives or the courts.

So I suppose I am now in the position of having to decide what is substantial, when the Congress, of coure, has not indicated what they consider to be substantial. They

have just left the whole frameworks open, haven't they?

Mr. Coyle: Yes, your Honor, except that I think the cases have given a good bit of guidance on that.

In addition to the Brown case I might mention the Standard Station case, which was cited by Judge Yankwich.

The Court: Well, that went into really a considerably substantial situation because of the relevance to the whole area, relative number of stations and distribution [fol. 1646] of oil, as I remember it was——

Mr. Coyle: About 6 per cent of all the oil distributed here, 6 per cent of all stations I think was involved.

The Court: Is that the percentage?

Mr. Coyle: I don't know all the ramifications of the opinion, but that was one of the opinions mentioned.

The Court: All right.

Mr. Coyle: But that would be just another guidepost, I think.

The Court: I was thinking that in that case—I haven't read that case in a long, long time—I was thinking that in that case there was something having to do with a tie-in between the producer and——

Mr. Coyle: That is what it was.

The Court: —producer and distributor, that was the main——

Mr. Coyle: It was the requirements contract.

The Court: That's right.

Mr. Coyle: But the market affected was 6 per cent.

The Court: But I didn't think that the market effect was the thing that determined the case, was it? I thought it was the tie-in between the distributor and the producer that was the basic thing in the case.

Mr. Coyle: Well, no, you see we have the Section [fol. 1647] 7—Section 3 has the same language as Section 7.

The Court: Yes.

Mr. Coyle: And as I read it, as I read the case the holding was that when the tie-in enables the manufacturer or producer to tie up 6 per cent of distribution that effect may be substantially lessening competition.

The Court: That is my understanding of the whole case.

Mr. Coyle: I was referring to 6 per cent being used as substantial in that case.

The Court: Yes, it was the control from the manufacturer and producer which was the crux of that case.

Mr. Coyle: 6 per cent.

The Court: Yes.

Mr. Coyle: And you have the same thing here where somebody goes out and takes over 4 per cent of the market.

The Court: Yes, but they don't control the purchasing.

Mr. Coyle: They are not manufacturing.

The Court: That's right.

Mr. Coyle: But they control the entire operation of the formerly independent firm.

The Court: They acquire greater bargaining power in the way of purchasing.

Mr. Coyle: I was referring to the word "substantial," [fol. 1648] 6 per cent, if 6 per cent is substantial, we say that 4 per cent would be substantial under that Section 7 here.

The Court: All right. I think you have pretty well covered what I had in mind, unless you have something else.

Mr. Coyle: I was going to pinpoint the two points that I believe the defendants made. One defense is the remaining area of competition. We have discussed that.

The other defense is good business motives. Now we don't see how the business motives——

The Court: Well, motive, I don't think—I have a tendency I think to go along with you on that, that motive alone is not enough. But it is the result, or effect, that is what is important.

In other words, you may have a motive to bring a better business relationship to your own concern by an amalgamation. But I don't think just the motive alone is of any great consequence. But the effect on lessening competition is the problem.

Mr. Coyle: That is back to the remaining vigor of competition.

The Court: That's right, that's right.

Mr. Coyle: I would say that it is not—there is nothing, I don't think there is anything in this record, or will be anything in this record to indicate that Shopping Bag [fol. 1649] was in a failing financial condition, or was in danger of going under——

The Court: I didn't mean to imply that it was.

Mr. Coyle: Yes.

The Court: I was merely getting into the, trying to get the feel of this. This is nothing but economics. This isn't law, this is pure economics is all it is.

Mr. Coyle: I think it ultimately——

The Court: It is law imposed, superimposed upon economics.

Mr. Coyle: But I think, your Honor——

The Court: And the trouble is they are trying to make economists out of judges. I don't know whether they have succeeded or not.

Mr. Coyle: I don't really think they are, your Honor. I think they are giving the courts pretty good guidelines.

The Court: You mean the Supreme Court.

Mr. Coyle: Well, I think Congress gave fairly—as clear a guideline as they possibly could. And the Supreme Court——

The Court: Oh, Congress could have said very easily, we will describe no amalgamation where capital is over a certain amount and where the percentage of the industry is beyond a certain amount—that would have been [fol. 1650] very simple to do.

Mr. Coyle: Yes, it would. But they didn't want to do that.

On the other hand, they could have said that only acquisitions which lessen competition, or are unreasonable and against the public interest, they could have done that. But they didn't use that language.

The Court: Well, I suppose there comes a time when maybe the Fifth Amendment does come into play, even in antitrust matters. Perhaps there is some due process left in the field, I don't know.

We talk about due process all the time, but we never seem to talk about it insofar as business is concerned.

Well, let me ask you this: How long do you think it will take you to put on your case?

Mr. Coyle: Well, I had intended to put three witnesses on, your Honor. I probably will cut that down to two witnesses.

The Court: All right. You anticipate how long a time?

Mr. Coyle: I will say two and a half hours, your Honor.

The Court: All right, counsel. And you, counsel, how long do you—do you anticipate live witnesses?

Mr. Alsup: I will call just Mr. Von der Ahe, your [fol. 1651] Honor.

The Court: Then I assume that testimony-wise, we will finish tomorrow?

Mr. Alsup: Yes.

Mr. Coyle: Your Honor, I have one other thing. We have suggested that their exhibits which show store by store competition, we believe that that whole issue was resolved in the pretrial conference order. If your Honor is disposed to admit the exhibits——

The Court: Well, I haven't indicated, I haven't indicated that.

Mr. Coyle: That's right. We would have rebuttal testimony as to that.

The Court: Well, if I admit them you will be entitled to do it.

Mr. Coyle: Yes.

The Court: And my present inclination would be to say that irrespective of whether it is controlling, it might shed some light on the whole picture. For that reason it would be admissible.

Mr. Coyle: In that event we would have rebuttal witnesses.

The Court: How much time for argument do you gentlemen desire? And I am perfectly willing to give you full, complete time for argument because I think that some- [fol. 1652] times, I find in cases that it is very helpful to me. I can read briefs and come to conclusions and then come into court and find after hearing the argument that sometimes I get a different slant entirely on the case.

How much time would you like for argument?

Mr. Coyle: We will bring that to the conclusion of the trial?

The Court: Yes, yes.

Mr. Coyle: Well, I would say——

The Court: I want to try to figure out the time.

Mr. Coyle: I would say an hour and a half for argument.

The Court: Well, that means two hours, doesn't it, counsel? With the interruptions and so forth.

Mr. Coyle: Some time over an hour, your Honor.

The Court: All right. How about you?

Mr. Alsup: I would like equal time, your Honor.

The Court: All right. Just the two of you are going to argue, or do you want someone else to argue, too?

Mr. Coyle: I haven't given it any thought.

The Court: I am not encouraging it, I am just asking you.

How about you?

Mr. Alsup: I think just I will argue, your Honor.

[fol. 1653] The Court: All right.

Now, gentlemen, I usually go from 10:00 to 12:00 and from 2:00 to 4:30. Do you have any desires about the time?

Mr. Coyle: No, your Honor. We will put on our two witnesses this afternoon.

The Court: Do those hours suit you?

Mr. Alsup: Very much so, your Honor.

The Court: Some of the judges tell me—I don't know whether I agree or disagree—that they find that the lawyers get a little tired from 4:00 o'clock and begin to drag in the case. But I don't know, it seems to me that it is an awful short day. I go at least until 4:30.

Mr. Alsup: Your Honor, in the depositions of the Government witnesses, we were taking four a day and the hours were going six or seven hours with great complaints from Harold Leibovitz, so we are used to long hours in this case.

The Court: All right. Then we will take up at—we will take up usually at 2:00 o'clock and go until 4:30. Take up at 10:00 and go to 12:00.

Mr. Coyle: If your Honor please, I don't know whether I made it clear at the time or not that——

The Court: We should finish this case then by Friday, without any question.

[fol. 1654] Mr. Coyle: Yes. There was announced last Friday that Kroger is acquiring the Market Basket chain. And it has previously been mentioned that American Stores—that is the Acme chain—is acquiring the Alpha Beta.

The Court: Well, the Alpha Beta was already owned by someone.

Mr. Coyle: American acquired them——

The Court: A long time ago.

Mr. Coyle: About a year ago.

The Court: Yes.

Mr. Alsup: No, this wasn't that long, your Honor, it was some six months after Von's.

The Court: That is what I thought. I remember reading it in the Wall Street Journal.

Mr. Alsup: And the Government investigated that at the time and no action has been filed.

Mr. Coyle: Well, I have been authorized to make the following statement: The Government has under open investigation the acquisition by Acme of the Alpha Beta chain and also the Federal Trade Commission investigation of the Market Basket chain.

The Court: Well, whether they do or don't, I will have to decide this case.

Mr. Coyle: That's right.

The Court: So what happens in that situation should [fol. 1655] not persuade me in this case.

Mr. Coyle: I wouldn't think so, your Honor. Defense counsel have been making a point of this investigation.

The Court: Well, it is one of those things that will bounce and go by. It has to. I can't consider that, I don't think, counsel, in this case.

What the Department of Justice does or doesn't do is no concern of mine until it gets into this court. Then I have something to say about it.

Mr. Alsup: No. The only reason we mention it is this, because it is a merger of two local chains, one of the largest chains, moving into the market for the first time, and almost three years have gone by and we think it is relevant evidence because they talk about Von's great power and——

The Court: Wait a minute. Are you finished, counsel?

Mr. Coyle: Yes, your Honor.

The Court: Come on up to the lectern, counsel, if you are about to make an opening statement. If you are going to get into elocution, I will be glad to hear from you.

Mr. Alsup: Your Honor, I am perfectly willing to defer it until later——

The Court: Not allocution but elocution.

[fol. 1656] Mr. Alsup: Whatever you prefer, your Honor.

The Court: No, we have got about—as a matter of fact,

I see it is five minutes to 12:00, counsel. How long will you take on your opening statement?

Mr. Alsup: I would anticipate——

The Court: With interruptions, a half to three-quarters of an hour?

Mr. Alsup: That is correct, your Honor.

The Court: All right.

Well, gentlemen, I would like to be in a position to decide this case at the earliest possible time.

Now what I am addressing myself to now is pretty much within your discretion. I am wondering if it can be said or you have each filed at least two or three trial briefs or memorandums. I am wondering if it is going to be necessary for me to read seriatim all of these affidavits and all of these narrative statements? I am not trying to avoid doing it, but if there is a shortcut by some summarization, I should like to adopt it.

Now, can I rely upon the briefs and this memorandum as setting forth substantially all of the data that is going to be included in these affidavits, depositions and et cetera? Or should you file additional memorandums of that?

What is your thinking about it?

[fol. 1657] Mr. Alsup: Well, our—I think our summaries, your Honor, fairly summarize what the witness has set forth in his affidavit and what the depositions show.

The Court: This is what you filed on June 7th, and it is labeled Defendants' Summary of the Facts Set Forth in the Affidavits of the Various Witnesses for the Parties?

Mr. Alsup: That is correct, your Honor.

The Court: Now, that does not cover depositions, though, does it?

Mr. Alsup: Oh, yes, your Honor.

The Court: Does it cover all depositions?

Mr. Alsup: It covers depositions up to the, all the 18 industry witnesses.

The Court: I see.

Mr. Alsup: There were some depositions which they took subsequent to that time which we could not——

The Court: Well, I understand, but what I wanted to be sure of was that I got all of it.

Now, counsel, what about you?

Mr. Coyle: We couldn't possibly agree that they have

summarized that testimony, your Honor. We filed our own memorandum——

The Court: Yes, I know you did.

Mr. Coyle: I think there are material differences in [fol. 1658] the summaries of both parties of this testimony and I would suggest that maybe we file additional memorandum.

The Court: Well, I don't want to burden you with work, I don't want to try to push it off on you, but I thought if I could save—I am sure that this case should be decided, it has been pending now since—what date was it filed?

Mr. Alsup: March of 1960, your Honor.

The Court: 1960, this is three years and it ought to be decided as soon as possible. I am sure you would want it decided.

Mr. Coyle: Yes, your Honor, no doubt about that.

The Court: Now, without trying to push the burden off on to you gentlemen, I am wondering how much you can do, or what you can do to assist me in not having to read verbatim all of these affidavits.

Mr. Alsup: Your Honor, that was my understanding of what you had asked us to do in preparing these summaries.

The Court: That's right. But I understand there is some additional that has not been treated that way, is that right, Mr. Coyle?

Mr. Coyle: That is correct, your Honor.

The Court: Can you treat it and do it that way, or is it necessary for me to read—do you want me to read the complete documents?

[fol. 1659] Mr. Coyle: If you read the documents you would have to read the depositions, too, so you would have a lot of reading to do.

The Court: That's right. And I have got cases that are pushing me, I have got a calendar set full until September with cases under advisement and I have been dragged into two Circuit Court cases that I have to write opinions on.

Mr. Coyle: I would say it might be worth thinking about filing some part of post-trial summary with the court.

The Court: Well, that is what I had in mind.

Mr. Coyle: To see what we could do with the matter.

It might also be well to postpone our oral argument, concluding argument until we file these.

The Court: Well, I would be willing to do that.

Mr. Coyle: I think that might make some sense. I am certain we don't need any voluminous briefs on this.

The Court: No, I don't think any briefing is necessary. Frankly, I think, if there is a controlling case, it is the Brown Shoe case. It is a question, when it gets down to a finding by the court, as to the potentiality of lessening competition. That is about what the case comes down to, it seems to me.

And I would appreciate it very much, if it wouldn't be too great a burden on you, to have you file some kind of [fol. 1660] an additional document that would summarize and make it unnecessary for me to read all of these affidavits.

Mr. Alsup: May I suggest in that connection, your Honor, we have tried to cover a broad scope with our affidavits——

The Court: Well, I want to say this, gentlemen, I appreciate very much, both of you, your exertion in this case. I think it is pointed out in the briefs, it is certainly an approach on this type of case without going through long dreary days of dragging testimony when it could be summarized and put down.

Mr. Alsup: It certainly is, your Honor.

The Court: So I want to say to you that I do very much appreciate the attitude of counsel on both sides.

Mr. Alsup: We appreciate your Honor's assistance in that regard.

What I was going to say is that Mr. Von der Ahe's affidavit, for example, ran some 40 pages. We summarized it in a page and a half. You are bound to lose some of the flavor——

The Court: I suppose.

Mr. Alsup: If you read just the summary. And I wonder if we might not——

The Court: I don't want you to come up at a later [fol. 1661] date and say, well, there has been error here now because I didn't read the entire whole record. This is what I want clearly understood, whether you are going

to insist that I read each and every document in the case. How about it, Mr. Coyle?

Mr. Alsup: We are not going to insist, your Honor, we think the summary is a fair summary and if counsel don't agree, they can point it out. And if we disagree with their conclusions, we can point that out.

The Court: Well, let me ask right at this point, is that agreeable with you, Mr. Coyle?

Mr. Coyle: Your Honor, I think that we have to perhaps analyze, as the court suggested, and submit another memorandum and if there are issues as to material facts, I suppose if one party says the summary of the deposition means one thing and the other party says it means another thing——

The Court: Then I will have to read it, of course. But I mean up to that point——

Mr. Coyle: Up to that point——

The Court: I can follow this procedure.

Mr. Coyle: I would say that is correct.

The Court: Now, you would say—you mean you agree to it?

Mr. Coyle: Yes, your Honor. I think we will submit [fol. 1662] a memorandum that——

The Court: But I mean if you find something that you feel that I should read—either side feels that I should read the entire document, then I will expect you to call upon the court to do so.

Mr. Coyle: Yes.

The Court: But in lieu of that, and until you do that, I am going to assume that neither side is objecting to following the procedure of reading summarizations of these affidavits, depositions and et cetera.

Is that agreed and understood?

Mr. Alsup: That's right.

Mr. Coyle: Yes.

Mr. Alsup: That is agreed and understood, your Honor.

The Court: All right. Then we will take a recess until 2:00 o'clock.

And I think, counsel, that your suggestion may be a good one, that to get any additional summarization—or, rather, whatever you want to call them—in, if you think it is advisable, we will put over the argument until next

week, or some time toward the end of the week when I finish a case.

Mr. Coyle: Yes, your Honor.

Mr. Alsup: It would seem to me, your Honor, since [fol. 1663] we have already furnished them with our summaries of the documents, they do not purport to summarize the testimony of all the witnesses, if they would point out additional matters, then we could respond to it, it might save more time than for us to go over and do over again the work that we have already done.

The Court: I didn't mean that you should do that. As I understand it, counsel, he has some documents in here that have not been summarized, is that correct?

Mr. Coyle: Well, I think, your Honor, that the parties adopt a different procedure, different approach as the testimony and the evidence——

The Court: I am not talking about that, counsel. I am talking now about affidavits which you have summarized such as counsel has done in his summary of the facts.

Mr. Coyle: There are some affidavits.

Mr. Alsup: There are affidavits here that were identical, your Honor, and that is the reason——

The Court: Yes. Now, I am wondering if—as I understand it, there are affidavits and there are depositions which you have not done, as he has done by a summary of the facts set forth in those documents.

Mr. Coyle: We haven't summarized everything, every witness, your Honor.

The Court: No. I am wondering if that could be [fol. 1664] done, or whether it is advisable to shorten the time that I would have to consider this case.

Mr. Coyle: As I said, we would attempt to do that.

The Court: All right. You see no objection to it, do you, counsel?

Mr. Alsup: I see no objection, your Honor. I suggest that it occurs to me, your Honor, that if I feel the necessity to furnish additional summaries in response to theirs, I can do so.

The Court: Well, I am not trying to add extra work on you, I am merely trying to get this case so I can—I would like to decide this case within the next 30 to 60 days and not have it drag along.

Mr. Alsup: We would like that, too, your Honor. We have waited a long time.

The Court: And let you get on your way with the appeal.

Mr. Alsup: Your Honor——

The Court: One of you.

Mr. Alsup: I assume, your Honor, that was addressed to Mr. Coyle.

The Court: What is that?

Mr. Alsup: I hoped, your Honor, that was addressed to Mr. Coyle.

[fol. 1665] Mr. Coyle: Well——

The Court: Well, it was addressed to whoever will take the appeal.

All right. We will stand in recess until 2:00 o'clock.

(Whereupon at 12:03 o'clock p.m., an adjournment was taken until 2:00 o'clock p.m. of the same date.)

[fol. 1666] Los Angeles, California, Tuesday, June 11, 1953, 2:00 P.M.

The Court: All right. Proceed, counsel.

Mr. Alsup: If your Honor please, this has nothing to do with my opening statement, but counsel's repeated reference to tendency to monopoly, I thought it might be of interest to your Honor to see one of our exhibits which indicates just a few of many thousands of grocery stores that are in business in this area.

If it is permissible, my associate, Mr. Vaughn, is going to set the exhibit up.

The Court: You mean he is going to try to. I can tell he is having problems.

Mr. Alsup: This is a reference here, your Honor—I can't understand mechanical things or figures, your Honor, so Mr. Vaughn is not only going to have to do that, but he is going to have to handle our affidavits and exhibits and so forth.

The Court: Counsel, that reminds me of the fellow that was taking a memory test and they asked him from whom he was taking it and he said he couldn't remember.

(Laughter in the court room.)

Mr. Alsup: I don't know if your Honor can see this, this purports to be——

The Court: I think I can see it, yes, I can. You [fol. 1667] have white and blue or black?

Mr. Vaughn: We have all colors of the rainbow.

Mr. Alsup: Your Honor, I think this lists only some of the 39 chains doing business in this area, possibly 800 of the—seven or eight hundred of the 4500 grocery stores doing business in this area.

The blue dots, I might mention, represent Safeway.

The Court: The blue, I take it, looks black from here, is that correct? Are there blacks in there, too?

Mr. Vaughn: No, sir, the blue is a darker color.

The Court: Oh, I see.

Mr. Vaughn: There is a dark green, which is Alpha Beta. But the round blue dots are Safeway.

The Court: I will tell you what I will do, I will take a look at it after court this afternoon. But I can see the general pattern.

Opening Statement on Behalf of Defendants

Mr. Alsup: Your Honor asked a very pertinent question of Mr. Coyle, it seems to me. You asked whether a failing company must be actually virtually in bankruptcy, if the court can't properly take into consideration the possible future trouble, must the company be lingering on its deathbed before it can sell out to someone else? As I understood Mr. Coyle's answer, he said that was the law. [fol. 1668] Your Honor, in the Brown Shoe case, on the very last page, the Supreme Court at page 346 of 370 U. S. pointed out:

> "* * * At the same time appellant has presented no mitigating factors such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position * * *"

In other words, no demonstration that it is going down.

The Court: Well, that is one of the things I had in mind when I was asking the question.

Mr. Alsup: Yes, your Honor. I think it was a very pertinent question.

The Court: You know, if the court will just talk enough,

they say you can find authority for anything. And the Supreme Court, like all other courts, writes page after page of opinion, and if you go far enough you can find authority for most anything—that is according to your interpretation, anyway.

Mr. Alsup: I couldn't agree with your Honor more. There is something in this opinion for everybody in every point of view. Naturally we think it supports our position far more than the government's, primarily because of that.

The Court: Well, I don't know, counsel. I will tell [fol. 1669] you very frankly, I have read the opinion very carefully and it reminds me very much of some of the Revenue Statutes I have read. And I have read them over and over again and I have had to put them aside and go back to them, because I guess that my training is just not such that I can understand the semantics of today. And I am sure that these gentlemen who write these opinions are so much more erudite than I am that I am just at a lower level of thinking.

Mr. Alsup: I wouldn't say that.

The Court: Because after reading these opinions hour after hour I am completely at a loss to understand certain parts of them.

Mr. Alsup: I was, too, your Honor. As a matter of fact, I had to go through it and make a digest page by page of what the various matters were that the Supreme Court talked about. If that would be of any assistance to your Honor, I would be glad to furnish a copy of it to you.

The Court: Well, would you object to giving counsel a copy of it?

Mr. Alsup: No objection at all.

The Court: Well, I would like to have a copy, because I do the same thing on a breakdown of the statutes in cases, I oftentimes do the same thing. And I would like to have it, if you will give counsel a copy also. It may be of assistance.

[fol. 1670] Mr. Alsup: May I approach——

The Court: Hand it to the clerk, please.

(The document was handed to the clerk and counsel.)

The Court: I don't say this to necessarily be critical of the opinion. I am not trying to do that. But I remember this is what I had in mind, I had noted that statement.

But counsel took the position that, as I rather gathered it, you could only consider imminent bankruptcy, or imminent failure.

Mr. Alsup: Well, they didn't say that. As your Honor has pointed out, there is something in this for everybody.

I might say, your Honor, that case references which I have given you——

The Court: Are the Law Edition.

Mr. Alsup: —are the Law Edition. I have it written in on my copy the 370 U. S. page. Would you prefer that, or would you like me to——

The Court: Well, I don't have the Law Edition here. I have just the other. And I would prefer it, if you will get someone to do that, I would appreciate it.

I will pass it back to the clerk. It will be very helpful. Otherwise I would have to do it.

Mr. Coyle: We would probably want to comment on [fol. 1671] this dissertation at some time, your Honor.

The Court: You will have full opportunity to take it apart if you wish, counsel. After all, it is no more than his opinion.

Mr. Coyle: That is right, your Honor.

The Court: Pure argument, a question of argument.

Mr. Alsup: I might say in that connection, your Honor, we have diligently searched statements concerning what Brown Shoe says or the factual statements contained in counsel's brief with reference to Brown Shoe, and we will want to comment on that, too.

The Court: Could you, counsel, before you start, just bundle up in one succinct statement just what the Brown Shoe case means? Maybe this is a rather difficult job, but see if you can do it.

Mr. Alsup: Well, I have never been very succinct, your Honor. But I will do my best.

To me, wiping aside all of the wheat and the chaff in the opinion, the Supreme Court said this: There are no per se tests; you cannot decide the validity of a merger just on the basis of a "substantial competitive factor" merging with another. You cannot decide it simply on the basis of "concentration," although these are factors that are to be considered.

What Congress intended was not to prescribe any

[fol. 1672] particular—any mathematical test at all, but to lay down certain general standards.

The Court: How about the percentages?

Mr. Alsup: Percentage is the same, your Honor.

The Court: Percentages in the market?

Mr. Alsup: They say that is an important factor to be considered, but it is certainly not the only factor. There are many other factors which necessarily require an economic inquiry into the nature of the competition and the effect of the merger upon that competition.

The Court: In other words, if I understand you, you are saying in effect, as the court said about the verticals—I have forgotten just where it is, but it said in effect that percentages were not controlling, if I remember.

Mr. Alsup: Absolutely, your Honor.

The Court: But they may have a bearing on the overall picture.

Mr. Alsup: They may have a bearing, that is right. And several District Court decisions since Brown Shoe have pointed the same thing out, that mere size or purported concentration or market shares are not, in and of themselves, decisive.

What was decisive, in my opinion, your Honor, in Brown Shoe, after many readings and re-readings of it, [fol. 1673] was the fact that over a period of 10 years the six major shoe manufacturers in the United States had been busy acquiring retail outlets, which not only foreclosed competing manufacturers from selling to those outlets, but gave the retail outlets of a strong national chain a distinct competitive advantage over the local independent retailer, because the strong national chain with its manufacturing powers and money could permit its local retail outlets to sell at lesser prices.

The Court: Well, let me ask you this, do you think the court took into consideration the fact that also there was a control over these—you call them I suppose licensees, or —what is the other term?

Mr. Alsup: Franchises.

The Court: Franchises, they excluded those persons from purchasing other shoes, did they not?

Mr. Alsup: No question about it, your Honor. Not a complete exclusion.

The Court: But to some extent there was exclusion, in other words?

Mr. Alsup: No question about it.

The Court: There was exclusion.

Mr. Alsup: Absolutely.

The Court: Well, was that inherently a part of that decision, do you think?

[fol. 1674] Mr. Alsup: No doubt about it, your Honor. I am not saying that was the basic reason for the vertical portion of the decision.

The Court: Well, that is what I am talking about now. I guess we are really on the vertical.

Mr. Alsup: On the horizontal they were concerned about these giant national corporations striding across the country, the cities and towns, as the Supreme Court said, and with their giant hands out, combined with their manufacturing facilities, enabling their local retail outlets to sell at a far less price than the local independent retail shoe dealer could do.

The Court: Well, counsel, in the absence of a cooperative buyer, isn't it generally conceded to be a fact that any person, as he increases his ability to distribute through sales, can also increase his ability to buy at lower prices?

Mr. Alsup: Absolutely, your Honor.

The Court: Is there any real dispute as to that problem?

Mr. Alsup: No dispute whatsoever. To my mind, the existence of the retailer-owned cooperative Certified, and the Orange Empire in this case——

The Court: Well, that is a huge empire, isnt' it?

Mr. Alsup: Tremendous empire, your Honor. Enough [fol. 1675] so that Von's, Safeway—none of the major chains can buy anything better than any independent retailer here who belongs to either Orange Empire or Certified.

The Court: Are there any restrictions, by the way, on independent retailers belonging to that organization—or rather receiving the benefits of that cooperative buying?

Mr. Alsup: No, your Honor, they have to make a deposit, I think representing two weeks' purchases.

The Court: I take it they have to pay some kind of a commission, don't they, or profit or something.

Mr. Alsup: No, it is owned by them, it is retailer owned.

The Court: There is no money set aside to build up capital then.

Mr. Alsup: Very little, your Honor. It distributes to its own members the patronage, advertising allowances, and everything else.

The Court: Is there any restriction at all on independents, that you know of?

Mr. Alsup: No restrictions at all. There have been some independents, your Honor, who have complained, "Well, Certified doesn't handle fresh meat, it doesn't handle fresh produce, and a large chain can buy better than I can in that respect."

Well, I say that they ought to go and observe the [fol. 1676] operations of the Joseph Goodnights, the Cecil Dobkins, or the Joseph Goldbergs, all single store operators, and all say that they can do better than the chains on meat and produce any time in the week.

The Court: I see. Go ahead.

Before you leave that, is that one of the facets that come into play on this question that something may lessen, substantially lessen competition?

Mr. Alsup: Very definitely, your Honor.

Certified Grocers, we have the affidavit of Charles Von der Ahe, who now I guess is 81 years of age, 81 years young I might say, who describes the origin and background of the organization of Certified.

We also have the affidavit of Campbell Stewart, who was for many years the president of Certified and now is a consultant to it.

And we have the affidavit of Joseph Hughes, who is chairman of the board of Certified.

And these people say any single store operator or small chain can do just as well as the large chains in the purchase of his groceries. And they would not have given us this affidavit, as Mr. Stewart said, if they felt this merger hurt the small grocers, because the small grocery is the lifeblood of Certified.

Actually, Certified had its origin, your Honor, in [fol. 1677] the fact that there were certain large chains here, back in the early twenties, who could buy directly. And some of the local wholesalers and brokers got together —I am sure your Honor is familiar with that case—and tried to persuade the manufacturers not to sell to the direct-

buying chains, or if they did, promise to boycott their products. The United States brought an action, I think it is reported in 7 F. (2d), and that combination was held illegal.

The Court: What was the name of that case, counsel?

Mr. Alsup: United States vs. Food Grocery Bureau——

The Court: Yes, I remember it. I remember it.

Mr. Alsup: So the independent grocers, recognizing that they were at a competitive disadvantage, got together and decided, "Well, we will band together and get our own little warehouse and we will buy in carload lots and we can do just as well as the major chains.

And that is what led to the Certified, Spartan, and Orange Empire cooperatives owned by the retailers.

The Court: There is no community of buying between any of the major chains, is there?

Mr. Alsup: No community buying at all. Some of the major chains are members of Certified, your Honor, and they take advantage of Certified.

The Court: In other words, they can participate—[fol. 1678] by Certified, you mean what now?

Mr. Alsup: Certified Grocers of California.

The Court: Is that the same as Orange Empire?

Mr. Alsup: No, Orange Empire is the A. M. Lewis organization with headquarters in Riverside.

The Court: That is an independent—that is privately owned, isn't it?

Mr. Alsup: Well, it is a strange thing. It is privately owned and retailer owned, as I understand it. Mr. Lewis is somewhat secretive about it, but the witnesses whom we have, and various of the government's witnesses whom we deposed, say that their dividends from Orange Empire are every bit as good as they are for the members of Certified Grocers.

The Court: What I was trying to find out, counsel—as I understand it, this is an organization that buys probably as much or more than anyone in the area, is that right?

Mr. Alsup: Oh, fantastically more, your Honor, and their growth has been fantastic.

The Court: I think I remember something like two hundred fifty million a year, something like that.

Mr. Alsup: I think it is even in excess of that, your Honor. I have the figure in my brief for the year 1960.

[fol. 1679] In 1948 Certified's wholesale sales to mem-

bers amounted to eighty-six million. And its members' retail sales were three hundred eighty-two million.

In 1958 Certified's wholesale sales to members had gone to three hundred thirty-eight million nine hundred thousand. And the members' retail sales had increased to one billion three hundred ninety million.

And Orange Empire is similar. Wholesale sales to members, twelve million five hundred thousand in 1945 and three hundred twenty-one million in 1962.

Now, these organizations, of course, have all of the power, buying power, of any of the major chains in this area.

The Court: Can both the chains and the independents operate through both of those organizations?

Mr. Alsup: That is my understanding, yes, your Honor.

The Court: In other words, Safeway, if they wish, can use either one of those organizations?

Mr. Alsup: I understand, your Honor, that Safeway has never belonged to Certified——

The Court: No, but I mean if they desired to, could they?

Mr. Alsup: Well, I would assume so. But I cannot answer that question, your Honor. I do know that Ralphs is a member of Certified. I cannot answer as to [fol. 1680] Safeway.

The Court: Now, as to Orange—Orange Empire, is that right?

Mr. Alsup: Orange Empire.

The Court: How about that, can the independents—do they become members and purchase through that organization, or do they just buy through them?

Mr. Alsup: I think they can become members, your Honor. I believe that was the testimony of the government's witness.

The Court: How about the chains, can they also go through——

Mr. Alsup: Oh, yes, your Honor.

The Court: That is what I thought. All right, go ahead.

Mr. Alsup: Now, we were talking about this—

The Court: I take it that all of these factors—it is your contention that all of these factors go into the question of taking the broad perspective of the market, or rather the section.

Mr. Alsup: Absolutely, your Honor.

The Court: To determine whether or not competition will be materially lessened, is that right?

Mr. Alsup: Absolutely, your Honor. I can see in Brown Shoe how a single independent shoe retailer, facing com- [fol. 1681] petition with a shoe outlet across the street controlled by a national manufacturer might have great trouble getting his product in the same price range as the outlet of a national manufacturer.

But that problem does not face any of these retail grocers in this area who can belong to Certified, Orange Empire or Certified subsidiaries, Spartan—there are some qualifications—there is a qualification——

The Court: Before you give me those, let's see if I understand you. You are in effect saying that any independent, one store, can resort to purchasing power through these two organizations, Certified or Orange, is that right?

Mr. Alsup: Absolutely right, your Honor. And every single one of our single store operators, Joseph Goodnight, Cecil Dobson, Rudy Dahl, Raymond Elkins—I think we have 12 of them, your Honor—say absolutely there is no advantage that any of the chains can get, that he can buy at every bit as good prices—I mean I can put the products on my shelf every bit as well as any large chain.

The Court: Then the competition would become, I take it, in the seller rather than in the purchaser. is that right?

Mr. Alsup: That is right, your Honor. And here again are affidavits from, oh, countless retailers, single [fol. 1682] store operators, small chains, larger chains, say there is no advantage when competition is on a store-by-store level.

The Court: Well, of course, I can see that counsel will probably contend that through the superior power of advertising, the media of reaching the public through radio, television, et cetera, that the combinaion gives the greater chain the more power in distribution, sales to the public. I assume that that is probably his contention.

Mr. Alsup: That is part of their contention, yes, your Honor.

And some of our retailers, single store operators, small chain witnesses, say yes, they have larger advertisements in newspapers, metropolitan newspapers, they have this

advantage. We have other advantages. And then they list them.

And the interesting thing about it is, your Honor, before the merger Von's advertised, Shopping Bag advertised, they both advertised in the metropolitan newspapers. The merger had no effect in that respect, except to permit some savings. And breaking up the merger isn't going to have any effect on the metropolitan newspaper advertising, except it will deprive these people of their savings.

Now, your Honor, we have referred to this statement on page 346 of 370 U.S. in the Supreme Court statement about the mathematical factors, such as possibly a company [fol. 1683] not being able to maintain its competitive position.

And we have shown through the Von der Ahe and through Shopping Bag—and now vice versa——

The Court: Just a moment. Let's see what is wrong with this modernized equipment here. This is a typical example of—we can't even have in the court room a piece of equipment that works correctly. And we are going to practically go to the moon tomorrow.

Mr. Alsup: I should have brought up some of my partners, your Honor, that have voices so they can talk so they don't need a telephone to talk to some of their clients.

The Court: Well, I suppose we will have to speak up, shut the equipment off. Speak up, the equipment is off.

Mr. Alsup: Now it will be shown by the affidavits of Mr. Hayden and Mr. Von der Ahe that Shopping Bag, for a three-year period, has been going through a period of declining net profits, despite increased sales, and that Mr. Hayden had perhaps expanded much too rapidly, and that he was running virtually a one-man show, and he was concerned about the future of the company because he had not provided for adequate management succession.

The Court: You are not now going to motive, are you?

Mr. Alsup: Not motive, your Honor. But I am going to a mitigating factor——

[fol. 1684] The Court: You are going to what you consider, I take it, would be circumstances that affect the picture, is that right?

Mr. Alsup: Circumstances which affect the picture, and particularly so since other companies at that time were

facing similar future problems—I am not saying they were identical, obviously there is no proof of that. But we do know that Boy's which had expanded very rapidly, starting in business in 1954 and getting to a 52-store chain by 1961, went into bankruptcy.

And the industry attributes that to too rapid expansion and inadequate management staff.

We know that Yor-Way, referred to in the affidavit of the government's witness, Joe DeSilva, started out in 1953, expanded very rapidly, and when its president, Jack Kennedy, died, Yor-Way immediately went into a financial decline and bankruptcy.

We know that McDaniels, which had expanded very rapidly in the fifties and had got up to a 24-store chain, when Boy's and Yor-Way went under and the creditors started pushing on McDaniels, they had to sell off several of their stores, and even that couldn't help, and McDaniels went into bankruptcy.

We are not saying that would have happened to Shopping Bag, but we are saying there was reason for Mr. [fol. 1685] Hayden's concern in 1959 and 1960. And this is a proper mitigating factor to take into consideration.

Now I am not saying, your Honor, if this merger were bad, if it actually led to complications——

The Court: Motive wouldn't affect it, wouldn't affect it at all.

Mr. Alsup: Motive wouldn't affect it in the slightest, your Honor.

The interesting thing is, your Honor, the government in its brief, and every government witness whom we deposed, flatly stated that since the merger of Von's and Shopping Bag, which occurred more than three years ago, there has been no lessening of competition, competition if anything has increased.

There is an interesting quote, and it is very short—if I may read it to your Honor—from the decision of the Aluminum Company case, a merger case, decided January 28, 1963, and reported in 1963 Trade Cases at paragraph 7653.

The court there said:

> "* * * The passage of almost three years from the time of acquisition to the time of trial would seem to

bring to light the anti-competitive effect of the same, if in fact it existed. Evidence to the contrary appears in the record. * * *"

Now counsel say, "Well, maybe this anti-competitive [fol. 1686] effect may show up in the future."

Well, Judge, all I can say is that we judge the future from the past. And their own witnesses admit the increased vigor of competition. Counsel in their briefs admit it, they admit there is no lessening of competition.

The Court: Well, how about his position that he is taking where he claims that the Brown Shoe case seems to indicate that that is not to be considered by the court?

Mr. Alsup: What he said, your Honor, is what the——

The Court: Isn't that what counsel said, did I understand him correctly?

Mr. Alsup: Basically, your Honor, that is what he said. I don't think he quoted the Supreme Court exactly correctly.

The Court: What is your answer to that?

Mr. Alsup: My answer is very easy, your Honor.

The Supreme Court said in the Brown Shoe, the remaining vigor of competition will not immunize a merger if—and this is a very important "if"—if the trend in that industry is toward oligarchy——

The Court: Whatever that means. What does that mean?

Mr. Alsup: All I know is this, your Honor, monopoly means a lot and so oligarchy means a few. And I [fol. 1687] know darn well that when we have 4500 different competing grocery concerns in this area, that is not oligarchy, or a trend to it.

The Court: Go ahead, counsel.

Mr. Alsup: Your Honor has indicated you regard the testimony of people familiar with the industry, active participants in the industry, of great importance.

The Court: Well, what I meant to say is simply this, counsel, that I have always considered a man of experience is far superior in his judgment than theoretical—any people, I don't care who they are, you can take the finest professor, Harvard professor, and he may be the leading authority on a subject, but I don't prefer him to do a serious operation on me as his first operation. I would prefer that he had at least a few.

Mr. Alsup: I couldn't agree with you more.

The Court: Because there is something about the practical aspect that you do pick up something, I don't know what it is, but you pick up something that the theorist doesn't get.

Mr. Alsup: That is for sure, your Honor.

The Court: Now, the theorists sometimes—the old saying is that what is good in theory must work in practice. Well, that sounds like a good statement but it just doesn't always work out that way.

[fol. 1688] Mr. Alsup: That is for sure.

The Court: So what I mean to say is this: I have the greatest respect for an educated mind. But an educated mind doesn't necessarily mean that the postulates upon which that mind works are correct, without the experience.

Mr. Alsup: I couldn't agree with you more, your Honor.

And just a simple example here I think illustrates the point. The government produced one witness, a man named Solomon Barondess. We took his deposition.

This is a man who has experience running a machine shop, running a hotel and a cigar stand, but with absolutely no prior experience in the grocery business.

And then he decides to go into the grocery business in 1958. He bought a tiny little grocery store up in Montrose. And he complained, when we took his deposition, he hasn't done as well as he expected to do.

Well, I would say no wonder. We have produced affidavits from people like Ted Wood of the Pantry Markets, who had spent 20 years with Alpha Beta learning the business, he decided to leave Alpha Beta and go on his own in 1954, and has been able to build up a 10-store chain, a very successful man.

We have another witness, also a graduate of Alpha Beta, Joe Goodnight, who was assistant to the president of [fol. 1689] Alpha Beta. He decided in 1960 to go into business for himself. He opened up his own market down in the City of Orange down in Orange County. And he is very successful, a very successful seven-store chain operator now.

Obviously there is no substitute for experience. And the man who lives in the business, worked in the business, in our opinion they are the best qualified men to judge,

from the standpoint of witnesses, the effect of this merger on competition.

And, as I say, every single one of our witnesses say there is not the slighest danger that this merger will lessen competition at all, or tend in any way to create a monopoly. There is no danger whatsoever that there will ever be a monopoly, or just a few, or even a few hundred groceries doing business in this area.

The Court: Well, as Judge Yankwich used to say in many of these opinion cases, his opinion was just about as good, he thought, as some of the experts.

Now, if an expert has had no experience in the grocery business, I at least have an advantage over him because I had had. I have at least been aware of the development of the community, being here many, many years.

But I am wondering if, since I have to finally decide the issues, if perhaps I am not just as qualified as an expert.

[fol. 1690] Mr. Alsup: Far more so, your Honor.

The Court: I don't say that, but maybe I am just as qualified to pass on these issues as some economist who has never been in the area.

Mr. Alsup: Your Honor——

The Court: I may change my mind, I don't know. But the only people I must admit were the greatest theorists in the world—but they had time and they lived in an era when they had, I am afraid, more brainpower than we have today—when the Greeks worked it out, they did it on mathematics. We are certainly not working on mathematics here. It is not a science.

Mr. Alsup: I have this feeling, your Honor——

The Court: It is a question of performance over a period of time under conditions, is that right?

Mr. Alsup: Absolutely, your Honor.

The Court: I have got to determine what that performance will be, now that there has been a merger.

Mr. Alsup: Right. I have this feeling, your Honor, the government counsel are from Washington——

The Court: Don't hold that against them, counsel.

Mr. Alsup: I don't critize them for that——

The Court: You know, we all once in a while have to go to Washington nowadays, particularly if you want to borrow money.

[fol. 1691] Mr. Alsup: Your Honor, I had to go back there

during the depression days to get a job. I enjoyed Washington. I am not criticizing. I enjoyed my days in Washington and learned a great deal.

But what I am saying is that their concentration argument is based on statistics gathered from the Bureau of Census in Washington, from statistics gathered from the Federal Trade Commission in Washington, and on statistics gathered from the Board of Equalization in Sacramento.

I say they could have made the same argument they are making here——

The Court: Well, the statistics, of course, may be worthwhile factors to consider. But the conclusions therefrom may be an entirely different matter.

Mr. Alsup: Absolutely.

The Court: So those statistics may be ever so reliable, but the conclusions, they are the problem.

Mr. Alsup: That is correct.

Recognizing the importance of the industry witnesses, your Honor, and I might say that was pointed out very emphatically several times in the government briefs, the importance of a retailer industry witness. And it is mentioned, of course, in the Brown Shoe opinion itself, the importance of these experienced industry witnesses.

We tried to get a representative cross-sample of [fol. 1692] the men who had been in the business in this area for a long time, or men who, after working for others for a long time, had started out for themselves and had been very successful as single store operators, and some have been able to and have expanded very successfully.

In other words, we got new entries into the business, people have preferred to stay single store operators. People have grown into small chains, people have grown into large chains, and we have got suppliers who deal with these grocers. We feel they are a most representative group.

And I want to say to your Honor very frankly that for the most part I do not regard the government witnesses, the government's industry witnesses as representative of this industry. Most of them, your Honor, ran small, tiny operations, the old tiny grocery store which I can remember—which actually, if there ever was a monopoly, probably enjoyed a monopoly far greater than anything could

be in the days before the automobile. There have been a number of disappearences of these very tiny operations.

But to compare a mom and pop grocery store operation with today's supermarket, whether it be run by a single store operator or a small chain or a large chain, to my mind does not give a representative picture.

As I say, there has been some disappearance of these small mom and pop stores, just as there has been a dis- [fol. 1693] appearance of the buggy makers and blacksmiths. This isn't something the chains have brought about.

A. & P. used to have 15,000 stores. It now has 4,000 stores and does five times the business.

The Court: Well, they got rid of their stores—where was it, New York?

Mr. Alsup: I think that was Safeway.

The Court: I guess that was Safeway. They decided that area was not profitable, so they left it.

Mr. Alsup: That's right, and there has been a trend, your Honor, from the small store, as you know, to the supermarket.

Mr. Von der Ahe's father had 87 stores in this area at one time which were later sold, I think there were 87, with a gross annual business of 3½ million dollars.

Compare that with the modern supermarket, a single store, which does that today, our witness Eugene Garson, with one supermarket out here, he does seven million gross a year.

As I say, the chain has not brought about the disappearance of the mom and pop store. The public has.

The Court: Well, counsel, I think you have to face up to it, that the chain has had its effect on the small store.

Mr. Alsup: Everything has its effect, your Honor.

[fol. 1694] The Court: And even the corner drug store, since it has become a place where you can buy everything from screw drivers to alarm clocks, it has had its effect on small hardware stores. I think we have to face up to the chains.

Mr. Alsup: I agree with that, your Honor.

The Court: That change has taken place. Now, if you want a pie or a prescription, you go to a drug store. And while you are there you buy a screw driver and a pair of pliers.

Mr. Alsup: Now since 1960 with all the discount houses entering the area, you can go in and get groceries, you can get everything, I think even up to tractors.

The Court: So we are in the age of movement.

Mr. Alsup: That is right.

The Court: Where we are going, I don't know, but we are certainly in movement. We are in orbit.

Mr. Alsup: Well, your Honor, we were furnished by the government an exhibit of a witness who they will call, Dr. Ward Jenssen, who has been studying this industry, and he has written a number of articles which we propose to offer as exhibits, predicting that by 1970 or 1975 the discount houses are going to put the supermarkets out of business.

The Court: Well, he may be right, he may be right.

Mr. Alsup: He may be right.

[fol. 1695] The Court: But on the other hand the supermarkets may put in the other items and put the discount houses out of business. We don't know.

Mr. Alsup: I will tell you this, from my study of the industry in three years, I am sure they will remain competitive, your Honor.

Your Honor, in reading the affidavits of the 30 government witnesses—I mean the statements as to what they would testify to if called, and in reading the brief that the government filed the other day, it seems to me that basically this is not an attack on the merger of Von's and Shopping Bag, it doesn't appear to be in essence. It is an attack on chains.

They tell us the chains can get into shopping centers and single store operators cannot do so. And the large——

The Court: Well, I think that is true——

Mr. Alsup: That is true.

The Court: —because of the fact that the average person who is going out to finance a deal on a center goes to an insurance company, and he likes to show a group of people who will go on the lease to make a good loan. Isn't that the situation?

Mr. Alsup: That is the situation, your Honor. Mr. Von der Ahe pointed out in his affidavit that Senator [fol. 1696] Engle, among others, has sponsored a bill in Congress which would guarantee a developer of a small

single store operator, and he thinks that legislation of that type would be desirable.

The important thing is, Von's could get into the shopping center before the merger, Shopping Bag could get into the shopping center before the merger. The merger had no effect on that situation.

The Court: That is just a question, it seems to me offhand, without resolving it now, that it is a question of financial ability.

Mr. Alsup: Absolutely, your Honor.

The Court: The insurance company would naturally prefer, before lending a million or two million dollars, to have someone on the lease that looked as if it might be good for 25 years, rather than an individual.

Mr. Alsup: I would expect them to, your Honor.

The Court: That might even apply in the case of lawyers, counsel.

Mr. Alsup: It might, your Honor.

The Court: Maybe your firm might be able to get a much better lease than a smaller firm.

Mr. Alsup: They charge us more, too, your Honor. It is a continuing problem.

We are next told by the affidavits of the govern- [fol. 1697] ment's industry witnesses and the government's brief, that this merger is terrible because the chains can operate their own warehouse and this gives them an advantage not enjoyed by the single store operators.

Your Honor, both Von's and Shopping Bag, each of them before the merger operated their own warehouses.

And breaking up the merger isn't going to change that situation in the slighest.

The Court: Well, it would just add back one warehouse, wouldn't it? In other words, you are operating now under one organized warehouse, whereas you had two before, is that right?

Mr. Alsup: That is right, one warehouse has been sold off to a competing chain.

The Court: What the government, I take it, is saying is that all of these factors—not one, but all of them—go to make up the lessening of competition.

Mr. Alsup: No, they admit there has been no lessening of competition, your Honor, in their own brief and every

one of their witnesses admit that there has been no lessening of competition.

What they are saying—and I think you will get this——

The Court: Are you sure they admit that, counsel?

[fol. 1698] Mr. Alsup: Yes, your Honor, I am sure.

The Court: Let me ask counsel—let me interrupt—in your brief, do you admit this?

Mr. Coyle: No, your Honor, we never admitted that.

The Court: Well, again it is a question of interpretation. All right, go ahead, counsel.

Mr. Alsup: I think it is a flat statement, your Honor.

The Court: Read it to me. Because I think if they admit that, as soon as you find it—I would like to hear it at a later time. I thought I had read the brief, but I don't remember that.

Mr. Alsup: I think it is in the appendix to the brief, your Honor, the summary, if your Honor please.

If your Honor will turn over to page 20 of their brief, your Honor, they say:

> "* * * The chains have all the advantages over the single store operators because they can operate their own warehouses * * *"

And the point I was trying to make is that they both had warehouses before the merger, and any advantage the chains might have would not be changed by breaking up this merger.

They next tell us, your Honor, in what seems to me [fol. 1699] to be an attack on chains, and not on this merger, that:

> "* * * The chains can afford to advertise in metropolitan newspapers and this gives them a tremendous advantage * * *"

And this is something that you and I were talking about before. But both Von's and Shopping Bag advertised in the metropolitan papers before the merger. And breaking up the merger wouldn't change that situation so far as their industry witnesses are concerned.

Then they tell us, well, the chains have an advantage

in purchasing meat and produce and dairy products which cooperatives like Certified Grocers do not handle.

Well, if there is such an advantage, both Von's and Shopping Bag each had it before the merger. And breaking up the merger won't change that in the slightest.

And, of course, your Honor, our affidavits point out that is just not true in any event.

The Court: Well, there is, counsel—let's face it—there would be a certain amount of advantage in a well-organized, well-managed company of chains in purchasing power, not having to let someone else do the purchasing for them. I can see that there might be some advantage in that.

Suppose, for example, Safeway had a topnotch team of people to run the purchasing end of the business.

[fol. 1700] Mr. Alsup: Absolutely, your Honor.

The Court: That would certainly be an advantage, but it is one that comes about by brains.

Mr. Alsup: Absolutely, your Honor.

The Court: But is that within the scope of the thing that we are talking about?

Mr. Alsup: Oh, no.

The Court: Would it be something that would be encompassed in substantially lessening of competition, in other words?

Mr. Alsup: No, not at all, your Honor.

And interestingly enough, people experienced in the meat business, people like Joe Goodnight who left Alpha Beta, and people like Cecil Dobson, who is one of our witnesses, single store operators, they both say they can do much better than the chains in the purchase and sale of meat.

The Court: Well, I don't know about that, now, and I am not about to favor anybody, but do you know anything about Safeway's meat policy?

Mr. Alsup: No, your Honor.

The Court: Well, I want to tell you they have got a pretty good one.

Mr. Alsup: I know they have, your Honor.

The Court: It is pretty well recognized in this community, and anybody who doesn't know it doesn't know the [fol. 1701] grocery business.

Mr. Alsup: They have got a wonderful public image, no question about that.

The Court: That's right.

Mr. Alsup: I will say this, your Honor, I notice lately that Ralph's has moved into the—you can see it on both sides—packaging. And I am sure they have a very fine meat operation.

The Court: I am not passing on one or the other. We are talking about image of the public, in the public eye.

Mr. Alsup: Oh, no——

The Court: Safeway has certainly—this is not evidence in the case, it is just by way of discussion—Safeway has certainly created an image in this vicinity on meat.

Mr. Alsup: They certainly have, your Honor, no question about it.

The Court: I think some of my good friends in the grocery business have admitted it, if they were to discuss it.

Mr. Alsup: I have heard that many times, your Honor, and their image is meat is terrific.

The Court: And I believe I recall how it came about, counsel.

Mr. Alsup: I would be glad——

[fol. 1702] The Court: There was a very active vice president out here at one time who tried to get some meat and found out he couldn't get it at his own store. So he inaugurated a policy of good meat so he could buy at his own store. That is the story, anyway. It may be true, it may not be true. But that is the rule.

Mr. Alsup: There are many who have good meat. Safeway is excellent, there is no question about this, your Honor.

There are many housewives who have a feeling, "Well, I can get goods cheaper at a large chain like Safeway or Ralphs or Von's than I can at a single store operation." That is the public image.

It is usually not true, but they imagine it is and that imagine is the trend.

The Court: It sells merchandise.

Mr. Alsup: It sells merchandise. Just like the individual operator has his built-in advantages of being on the job, getting acquainted with customers, selling personality and

service and that is a very difficult thing for a chain to do, for the store manager, as your Honor knows.

The Court: Tell me, there is no involvement in this case—I hope not, anyway—of the fact of the chain stores having the greater capacity on leader items, things of that kind? That is not involved in this case at all, is [fol. 1703] it?

Mr. Alsup: No, your Honor, I don't think the question of loss leaders is in issue here at all.

The Court: I don't mean as such. But I mean in their ability to lessen competition.

Mr. Alsup: No, your Honor.

The Court: It is not involved in the case, as I see the pretrial order.

Mr. Alsup: No, it is not involved in the case at all.

Mr. Coyle: I should think it would be one of the peripheral elements that we will go into, your Honor.

Mr. Alsup: Well, if it were a peripheral element, we would be pleased to, because the single store operator, because they have flexibility of management, they can go next door and see what the chain is advertising or featuring, and come back and beat the chain.

So a chain to do that, you have to make it chainwide, because there are California——

The Court: They have purchasers, too, don't they? Do they still have purchasers that go around and make purchases, or have they quit that?

Mr. Alsup: I don't know if they have purchasers who go around and make purchases. I do know that they check one another's specials, go into the stores of one another, [fol. 1704] just like single store operators go into chain stores.

Mr. Von der Ahe, I am sure, could answer your Honor's question.

The Court: Well, maybe they will develop the—what do they call it when they run a surprise movie on television, what do they call that—surprise preview.

Mr. Alsup: Surprise preview.

The Court: Yes. Maybe they will develop surprise previews in the grocery stores.

Mr. Alsup: Well, the single store operator who doesn't have to go through a long chain of command can do that,

as our witness Joe Goldberg, who was formerly an executive of Alpha Beta, he points this out in his affidavit.

The Court: You know, counsel, these arguments remind me of nothing, we will say a railroad yard, such as in Chicago where there are thousands of tracks, and if you follow long enough you will come back to the main line. They all come back, really, each one, to the one proposition of: Was there a substantial lessening of competition—or might there—the word "may" is in the statute—may there have been a substantial lessening of competition.

It is really a factual question, isn't it?

Mr. Alsup: Absolutely, your Honor. And it is best resolved, in our opinion, by the testimony and the experience of the representatives and cross-samplings of the [fol. 1705] people who know the business in this area.

The Court: Have you, for example, either one of you, had any—I believe I remember you have affidavits from one of the Ralphs.

Mr. Alsup: Yes, your Honor.

The Court: How about Safeway, do either one of you have affidavits from Safeway, any members of the Safeway organization?

Mr. Alsup: No, your Honor.

Mr. Coyle: No, your Honor.

Mr. Alsup: Safeway has been involved in so much litigation in various places——

The Court: They don't care to get involved, I see.

All right, go ahead.

Mr. Alsup: Finally, your Honor, we were told in the government's brief that the small independent operator may be adversely affected simply because Von's got its stock listed on the New York Stock Exchange, and if so, this had "the illegality of a merger."

Now, how that could possibly affect a single store operator we don't know.

The Court: Is that in the brief? I didn't remember that.

Mr. Alsup: Page 27 of the brief, your Honor.

[fol. 1706] The Court: That sounds like a statement from Adam Smith.

Mr. Alsup: It did to me, too.

The Court: What page is that on?

Mr. Alsup: I have it noted on page 27, your Honor, line 12 to line 17—line 18.

Mr. Coyle: I think the whole sentence, your Honor, is clear.

The Court: All right. I will meet that problem when I come to it.

Mr. Alsup: May I check the brief, page 44, your Honor.

It seems to us that in this case, even though they do not use the words "per se," the government is relying on discredited and outmoded per se tests, because first they say Shopping Bag was a substantial competitive factor which has been eliminated.

The they tell us on page 44 of their brief that the test of illegality is not the elimination of competition by the acquired and acquiring concern, but rather it is the effect of the merger on the vitality and vigor of competition generally throughout the area.

Mr. Coyle: What line is it on page 44 of our brief, counsel?

The Court: What line is that, counsel?

[fol. 1707] Mr. Alsup: On line 5, they point out, your Honor—page 44:

> "* * * Congress intended the validity of such combination was to be gauged on a broader scale than competition between the acquiring and acquired concerns. * * *"

Then they refer to the American Crystal Sugar case and they quote from it at line 11:

> "No longer is elimination of competition between the companies themselves the test * * *"

Mr. Coyle: I don't believe that is what counsel was quoting as having said a few minutes ago.

The Court: What is it?

Mr. Coyle: That is what we said, but that isn't what counsel quoted as having said a few minutes ago.

The Court: Well, I am hearing now what he is saying now. I have forgotten what he said a while ago.

Mr. Alsup: Perhaps I could get it, your Honor——

The Court: No, no. The thing that is confusing in this case, once in a while statements are being made, or questions put that are practically non sequitur. I don't understand.

If I am to consider this, that the competition between the companies has nothing to do with it, I think that is counsel's position, that is, the counsel for the govern- [fol. 1708] ment. I understood him that whatever may have been the competition between the two chains involved here—if you can call them chains—is of no materiality.

Mr. Alsup: We think it is relevant.

The Court: Isn't that his position?

Mr. Alsup: I think his position is peripheral, your Honor.

The Court: No, he is saying that you have to go to the whole segment of this area.

Mr. Alsup: Yes, that's right.

The Court: Take it from the over-all picture, whether or not it tends to lessen the competition in the whole area.

Mr. Alsup: Yes.

Mr. Coyle: If your Honor please, I think I can clear this up. I think there is a premise that goes before that. Once you establish a line of commerce in a section of the country, and establish, as we have in the pretrial order——

The Court: There is no question about the line of commerce, nobody disputes that.

Mr. Coyle: There is no question either as to, in the pretrial order, that the leading chains in the area, including the two defendants, competed intensively with each other in that line of commerce in that section of the country.

[fol. 1709] The Court: I remember that, I remember that in the pretrial order.

Mr. Coyle: And once that is established, then the test is the importance of these two defendants in that line of commerce in that section of the country.

In other words, it isn't merely the elimination of competition between them, it is the removal of one of these factors, competitive independent factors from the over-all line of commerce.

The Court: Well, I think, counsel—I may be mistaken—but I think in some respects that you may be in a trap

on that provision, if that is to follow, that is, if you are to concede that what counsel has just said.

Mr. Alsup: I don't concede it at all, your Honor. The words "intensive competition" were discussed by government counsel, Mr. Bates of the firm of Johnson, Bates & Sheffield, Mr. Vaughn and myself. We agreed to it, their complaint alleged it, our answer admitted it.

Where there was competition, your Honor, we agreed that it was intense. But that doesn't mean extensive.

The Court: Well, all right. But let's take that statement—will somebody give me, please, the paragraph number of that statement?

Mr. Coyle: Your Honor, paragraph 46, I think.

The Court: Paragraph 46.

> [fol. 1710] "In 1958 the 20 leading chains of supermarkets in the Los Angeles area, including the two defendants in this action, competed intensively with each other and with other grocers and firms engaged in the purchase, distribution and retail sale of groceries and related products in the Los Angeles area. * * *"

I take it that means the metropolitan area.

Mr. Coyle: That is correct, your Honor.

Mr. Alsup: Correct.

The Court: Now, what one of you is saying, in effect, is putting the fillip—the government counsel is putting the fillip on this which would practically eliminate the question of competition by saying that this means that you have conceded that these two chains, the two defendants here were engaged in competing with each other and with everyone else.

Mr. Alsup: Wherever a Von's and Shopping Bag store, your Honor, could serve identical customers, there is no doubt that competition was intense.

The Court: Yes, but the point, counsel, is in many areas they were not competing insofar as the area——

Mr. Alsup: That is right.

The Court: That is not the broad area, not the region.

[fol. 1711] Mr. Alsup: That is right.

The Court: But in the vicinity, we will call it.

Mr. Alsup: That is right.

The Court: For example, say Maywood—I don't know whether they had both stores there or not.

Mr. Alsup: Yes.

The Court: Say Maywood. Now, they may be within a block or two of each other, competing, or a few blocks.

Mr. Alsup: Yes.

The Court: But where one is in, say, Anaheim and another in, say, Beverly Hills—just using this as an example—then is this statement meaning that they were intensively competing with each other?

Mr. Alsup: No. Obviously, your Honor, we would never agree that the Von's Store in Beverly Hills competed with a Shopping Bag Store out in Lancaster.

Your Honor, we have spent an awful lot of money having studies made to show the very little overlapping of competition. Where they were competing, they competed intensively.

Now, your Honor, before the merger they competed for new locations wherever one might be available. And I am sure that they competed intensely.

But when you talk about competition between one re- [fol. 1712] tail store and another, I trust I was not stupid enough—and Mr. Bates and Mr. Vaughn with me—to agree that a grocery store in Beverly Hills competes with one in Anaheim.

The Court: Well, the question is, does this statement mean that? What do you say?

Mr. Coyle: It can only mean one thing, that the chains, the Von's chain competed with the Shopping Bag chain intensively in the Los Angeles area, that there were enough Von's stores and enough Shopping Bag stores in the area that they were an important enough factor in the area and they were doing enough advertising and were spread out in enough different areas in the over-all area of the community so that the two chains were competing intensively with each other.

And we by-passed this issue of proving competition as to individual stores. That is all this paragraph can mean.

Mr. Alsup: Now, your Honor——

The Court: What do you say to that, counsel?

Mr. Alsup: I say that this is an afterthought on government counsel's part, your Honor, which violates, in my

opinion, the terms of the pretrial order negotiated in good faith. And I can demonstrate it——

The Court: Well, now, before we do that, let me ask you this—you know, when I read this over, I was concerned about this paragraph, because if you take the plain [fol. 1713] language, it says that the 20 leading chains of supermarkets in the Los Angeles area, including the two defendants in this action, competed intensively with each other and with the other grocers and firms engaged in the purchase—and so forth—in the Los Angeles area.

Now, I am wondering if the plain English there doesn't connote what government counsel says it does.

Mr. Alsup: If it does, your Honor, we were derelict.

The Court: Well, it is never too late to be relieved, you know, counsel, if you feel that something in the pretrial— —

Mr. Alsup: I would like to add a qualification, your Honor, because——

The Court: I am not suggesting that the pretrial order be amended, but I think it is within the power of the court, if there has been inadvertence or mistake—I haven't yet interpreted this, but I am beginning to believe that the interpretation of the government may be right, it may be so considered on appeal.

And I am wondering if——

Mr. Alsup: I would like to have it corrected then, your Honor.

The Court: Well, I want you to consider it— don't just do it on my say-so. I may be in error about it. [fol. 1714] But government counsel is contending that, is that right?

Mr. Coyle: Yes, your Honor.

Mr. Alsup: Then I will want to correct it, your Honor. And I will tell you why, your Honor. The dictionary, Webster's Dictionary definition of intensive is—one of them is "opposed to extensive." Now——

The Court: Where did you get that from, the dictionary?

Mr. Alsup: From my good friend, Mr. Bates, who took it out of Webster's Dictionary.

The Court: I see.

Mr. Alsup: It is something of a problem for the court, I might say, your Honor——

The Court: Well, if you are satisfied with it, counsel, it is perfectly all right with me, but——

Mr. Alsup: If you have a question, someone else might, your Honor. And I would want to have it corrected.

The Court: Well, I may be entirely in error, but I know that when I read this, I had read it hurriedly prior to this time, but I have not read it with quite the understanding that I had this last reading. When I struck that paragraph, it caused me to halt, hesitate and think.

And I was wondering then if it meant that this was an admission that you were actually in competition—whether you call it intensively or extensively in competition at all—[fol. 1715] with, between Von's and Shopping Bag, insofar as the line is concerned, the line of commerce.

Now, let's don't get this case off on the wrong foot and have to go up and come back again.

Mr. Alsup: No.

The Court: Because there is a misunderstanding of the word "competition."

Mr. Alsup: Your Honor, I would like to make a motion to amend the pretrial order under those circumstances because when this applies, say, at the time we entered into these negotiations for the pretrial conference order with government counsel, we had spent several thousand dollars having studies made to show the extent of overlap between trading areas, between particularly Von's and Shopping Bag stores.

We had consistently contended in our statement, our contentions of fact and law and elsewhere, that there was hardly any overlap in their trading areas.

We think government counsel interpreted that just as we did. And let me tell you why——

The Court: What was that interpretation?

Mr. Alsup: The interpretation is wherever they did compete in fact that competition was intense.

The Court: Well, that isn't what it says.

I think what we had better do, we are about at the [fol. 1716] recess time, it is 10 after 3:00, maybe you and counsel on the other side had better confer.

I am not suggesting anything, except the question comes into my mind whether or not this is going to become a stumbling block in the case.

Mr. Alsup: Yes.

The Court: We want to decide this case on clear-cut issues.

Mr. Alsup: No question about it.

The Court: So that the higher court may also decide it on the findings which will be clear-cut. And I am wondering if we don't have a problem here in paragraph 46.

Mr. Alsup: Your Honor——

The Court: What do you think, counsel?

Mr. Coyle: Your Honor please, I don't believe there is any problem, if this paragraph means what it says——

The Court: Well, it is all in your favor so there is no problem. That is what you are saying.

Mr. Coyle: We pointed this out to defense counsel a year ago January, told them that if they wanted to amend the pretrial order, they should amend it then.

The Court: Well, don't I have the power at this time to permit an amendment.

Mr. Coyle: The court always has the power, of course.

[fol. 1717] The Court: Yes. Well, it may be, it is very late in the day but it is never too late to call out the fire department if you have a fire, isn't that right?

Mr. Coyle: You asked me my position.

The Court: Yes. You are opposed to it.

Mr. Coyle: Yes, your Honor.

Mr. Alsup: Your Honor, can I mention one thing before proceeding, your Honor?

The Court: Yes.

Mr. Alsup: After this pretrial order was signed and filed——

The Court: Well, let me ask you this before you say anything. Are you concerned about it, counsel?

Mr. Alsup: Yes, we are.

The Court: Well, I think you had better—I think we had better take a recess and you had better consult with your associate counsel, and if you desire to, then maybe consult with government counsel, and at the proper time I will rule on anything you present.

But I may be in error in my interpretation, but I am afraid I may be interpreting it the same way the government does.

Mr. Alsup: Well if you might, the higher court might.

The Court: Could be. It could be possible that [fol. 1718] the higher court might go along with my thinking.

Mr. Alsup: The next time when I negotiate with government counsel, your Honor, I will get a book on semantics.

The Court: Well, you would like to think it over?

Mr. Alsup: Yes, I would like to, your Honor.

The Court: Well, let's take about a 15-minute—15 minutes is ample, isn't it?

Mr. Alsup: Oh, yes, your Honor.

The Court: We will take a 15-minute recess.

(Short recess.)

The Court: All right, proceed.

Mr. Alsup: If the court please, I respectfully move, in the interest of manifest justice, that paragraph 46 of the pretrial order, which is on page 8 at line 23, be amended.

The Court: Page 8?

Mr. Alsup: Yes, your Honor.

The Court: All right.

Mr. Alsup: Be amended by adding thereto, changing the period on line 23 to a semi-colon and adding the following words——

The Court: Let's see, where would the semi-colon go? After "area"?

[fol. 1719] Mr. Alsup: Yes, your Honor.

The Court: I see.

Mr. Alsup: "But defendants contend that there was not substantial competition——"

The Court: Just a moment, counsel, I have lost my tablet here.

Mr. Alsup: I beg your pardon.

The Court: Here it is. Go ahead.

Mr. Alsup: "But defendants contend that there was not substantial competition between Von's——"

The Court: ". . . there was not substantial——"

Mr. Alsup: "—competition—"

The Court: "—competition—"

Mr. Alsup: "—between Von's and Shopping Bag as such; that is, that there were very few Von's and Shopping Bag stores which were near enough——"

The Court: Wait a minute, counsel, I don't take shorthand.

"—that there were very few Von's and Shopping Bag——"

Mr. Alsup: I beg your pardon. "—stores—"

The Court: "—stores—"

Mr. Alsup: "—which were near enough——"

The Court: All right.

Mr. Alsup: —"to each other to be in competition [fol. 1720] for the same customers."

The Court: Well, let's see if I have it now. You are moving that on line 23, after the word "area" there be put a semi-colon.

Mr. Alsup: Yes, your Honor.

The Court: And that the pretrial order be amended by inserting at that point "but defendants contend that there was not substantial competition between Von's and Shopping Bag as such; that is, that there were very few Von's and Shopping Bag stores—" is that right?

Mr. Alsup: Yes, your Honor.

The Court: "—which were near enough to each other to be in competition for the same customers."

Mr. Alsup: Yes, your Honor.

The Court: What is the government's attitude?

Mr. Coyle: Your Honor, I am opposed to that. This is a stipulation, I wouldn't stipulate that in any way, shape or form.

And I would object to amending this pretrial order at this late date in the middle of trial. Our whole trial preparation has been gauged to refute this pretrial conference order. We have stipulated to this pretrial conference order and that these defendants competed intensively in the Los Angeles Metropolitan Area and in that section of the country. I just couldn't. I think it would be manifestly [fol. 1721] unjust to expect us to go forward with this expedited procedure at this late date. This is a new issue in the case. We said this in December 1961. We have been saying this to defense counsel, that it is not an issue any longer.

Now for them to come in at this late date, after the trial has been going on for approximately six hours, to come in here and say that it is manifestly unjust——

The Court: First of all you are refusing to stipulate. That is your privilege.

Mr. Coyle: That is correct, your Honor.

The Court: And the next thing is, what do we do then with paragraph 46?

On what ground is your motion based, counsel? Is it through inadvertence?

You say it is manifestly unjust—that is some of the broad terminology.

What specifically is the reason for your moving at this time? I mean no criticism of you, because I can see how there could be a misunderstandnig over this paragraph.

Mr. Alsup: There clearly was a misunderstanding, your Honor, and that is one reason why, on November 1, 1962, in an effort to resolve this problem, we filed a motion for a further pretrial conference and notice of motion for a statement and memorandum of points and authorities in support of the motion. So that this issue could have been [fol. 1722] resolved at that time.

The Court: That is probably my fault, I didn't grant you that, did I?

Mr. Alsup: Your Honor suggested it be resolved at the time of trial.

And an additional reason, your Honor, is this: After the pretrial order had been agreed to by both parties—and I can say to the court that my understanding conforms exactly with that of Mr. Bates and with Mr. Vaughn as to what we intended by this word "intensive"—and we believe the government with our interpretation for these reasons——

The Court: In other words, counsel, what you are saying is, in your opinion there has been a misunderstanding.

Mr. Alsup: That is correct, your Honor.

The Court: Don't you think there has been a misunderstanding, Mr. Coyle?

Mr. Coyle: I am not going to dispute Mr. Alsup, if he says there has been a misunderstanding——

The Court: Well, Mr. Coyle, your interpretation has been literal, is that right?

Mr. Coyle: My interpretation is always literal.

The Court: Well, now, "always" is a mighty big word.

Mr. Coyle: Almost always.

The Court: That is reserved for song writers, [fol. 1723] "always."

Mr. Alsup: May I point out——

The Court: Because—let me just finish.

Mr. Alsup: I am sorry.

The Court: The word "intensively," what is your interpretation of the word "intensive."

Mr. Coyle: It means that they are in strong competition between the defendants in this area.

The Court: Well, let's put an interpolation there.

Your interpretation, as I gather it, is that there is strong competition between the two defendants and the other members of chains and between the defendants themselves.

Mr. Coyle: That is correct, your Honor.

The Court: Well, there is the problem. There is the problem. That word—I can see what your point is, that it would open up an issue now that will have to be tried as to what is competition between these two groups.

Mr. Coyle: That is correct, your Honor.

The Court: Which is Shopping Bag and Von's. But I think now is the time to do it rather than have it go up and come back, is that right?

Mr. Coyle: Yes, that is up to your Honor.

The Court: Counsel, may I—my purpose here, as [fol. 1724] I understand, is to try to bring about justice.

Mr. Coyle: Yes.

The Court: Try to bring about a complete examination of all of the facts and arrive at a just decree.

Now, don't you think that under the circumstances that I am more or less compelled to do something?

Mr. Coyle: Yes, your Honor. I think they brought it up too late. It may be that it comes at a point when a party has waived their right to come in here and amend these pretrial conferences——

The Court: In this court it is pretty hard to waive a right, counsel.

Mr. Coyle: I agree with your Honor, I think that that is true.

On the other hand, it may be that we are going to have to get some additional evidence and——

The Court: Well, I can see how that may occur.

Mr. Coyle: Yes.

The Court: I can see that.

Mr. Coyle: Yes.

The Court: As I understand it, you are taking the position, though, as a legal matter, that the competition between the two groups of stores is of no moment.

Mr. Coyle: Between the—no, no, I am taking the position as a legal matter, once we establish a line of com- [fol. 1725] merce and section of the country and establish these two chains were competitive factors in that line of commerce in that section of the country, and that they competed intensively with each other and with other chains, then you don't look at——

The Court: I know, but now you have inserted something. You said as long as they compete intensively with each other.

Mr. Coyle: Yes.

The Court: But the point I thought you were making is this, that we have a Metropolitan Area.

Mr. Coyle: Yes, that is true, your Honor.

The Court: And that all of these 20 leading chains, including the two defendants here, were competing with each other.

Mr. Coyle: That is right.

The Court: Meaning they were competing with the other members of the chain and with each other, to-wit: Von's and Shopping Bag.

Mr. Coyle: That is correct, your Honor.

The Court: Now, counsel comes forward and says the fact is that in many instances they were not actually in competition with each other.

Now, this again is a question of semantics, whether you mean the over-all picture or whether you mean just the [fol. 1726] competition between store-to-store.

Mr. Coyle: I think it is counsel who have the semantics. They say there was no competition between the chains or between the stores.

The Court: Oh. I don't think they are saying that. I didn't understand that.

Are you saying that, counsel?

Mr. Alsup: No, your Honor. We have prepared maps previously and furnished them to the government long before the pretrial order——

Mr. Coyle: No, your Honor——

Mr. Alsup: —showing that there were some over-lapping trading areas.

The Court: Now wait a minute. Perhaps I misunderstand you again.

I thought it was conceded by both that as an area, or a sector, or, to-wit, the Metropolitan Area, that all of these were competing in that area as a whole.

Mr. Alsup: That is right.

The Court: No question about that.

Mr. Alsup: No question.

The Court: But I also understand you to mean that you are contending that there was a substantial amount—or not a substantial amount of competition between the stores of Von's and Shopping Bag.

[fol. 1727] Mr. Alsup: That is correct, your Honor.

The Court: Now this, as I read this statement, Paragraph 46, I think I would interpret it to mean that you have said that there was intensive competition between Shopping Bag and Von's. Do you so interpret it?

Mr. Coyle: That is right.

The Court: Now, if we do do that, it may be that we might be right in our interpretation.

Mr. Alsup: That is the reason I made the motion, your Honor.

The Court: But I can't make him agree to it, counsel.

Mr. Alsup: Oh, no, your Honor.

Can I say, in response to counsel's statement that they will have to revise their case and so forth, can I make a statement?

The Court: Yes.

Mr. Alsup: After this pretrial conference order had been agreed to which contained that language, two months after, counsel furnished to us exhibits prepared by their expert witnesses, Professor William Brown and Dr. Ward Jenssen, purporting to show that there were substantial over-laps between particularly Von's and Shopping Bag stores trading areas.

Why, if they interpret the pretrial order as they [fol. 1728] do now, did they give us those exhibits after the pretrial order?

Secondly, your Honor, in June of 1961—again after the signing and filing of the pretrial order, they filed a brief

before trial, and they argued in that brief that there was a substantial overlap.

In December of——

The Court: What is the brief you are referring to now, which one, counsel?

Mr. Alsup: June 1961 is the——

The Court: I have June 7—22nd—that is not the one—I have it here. Jut a moment. It is June——

Mr. Alsup: June 17th.

The Court: I have it filed the 11th.

Mr. Alsup: That may be right.

The Clerk: There was one filed on the 20th.

The Court: No, I am talking about the government's trial brief. It says—it is marked in here in pencil—what does your record show, Mr. Clerk?

The Clerk: June 20th.

Mr. Alsup: June 20, 1961.

The Court: Take the record, Mr. Clerk, and compare this with it and put the right file date on there, will you, please.

The Clerk: That is not the same brief. They [fol. 1729] must have filed two briefs. This one is entitled "Brief Before Trial."

What is the caption on it, "Brief Before Trial" or "Trial Brief." There are two of them.

The Court: I have Government's Trial Brief.

Mr. Alsup: We have our first——

The Court: See if it is the same one.

The Clerk: No, it is not.

The Court: That is strange. I have read the other brief.

Mr. Alsup: These briefs were filed to other judges, your Honor.

Mr. Coyle: These were briefs filed two or three years ago, your Honor.

The Court: I see, I see. That is the reason——

The Clerk: Oh, this is the 1960 brief, this was filed——

The Court: Yes. I haven't gone back and read everything in the file.

The Clerk: That is the '61 brief.

Mr. Alsup: No, no, I fully appreciate that, your Honor. That is the reason we furnished briefs——

The Court: You are referring back to a brief that was filed when it was filed before Judge Mathes?

Mr. Coyle: I believe it was still before Judge [fol. 1730] Mathes. it may have been transferred to——

The Court: Yes, it was before Judge Mathes. I have that brief here now.

Mr. Alsup: The point I am trying to make is after the pretrial order had been filed, this brief was filed.

And on page 17 of that brief they say:

> "* * * By virture of their geographic proximity 18 Von's stores and 24 Shopping Bag stores, or over 50 per cent of all stores, either operating or planned by both companies on March 28, 1960, could serve identical customers * * *"

Obviously they were talking about the extent of the competition between Von's and Shopping Bag.

Then in December of 1961, your Honor, almost eight months after the pretrial order was filed, the government filed a motion for summary judgment—I should say first their motion for summary judgment, I believe that was in December of 1961—it could have been December of 1962—however, I have lost track of time——

Mr. Coyle: It was December 1961, your Honor.

The Court: It must have been 1961 because it was in my court in '62.

Mr. Alsup: I see.

In that—I am not quoting verbatim, your Honor—in that motion for summary judgment they say, because [fol. 1731] they were arguing the per se test, the extent of competition between Von's and Shopping Bag stores may be an issue of the trial, but it is not relevant on our motion for summary judgment.

And as for their exhibits—and Mr. Vaughn, would you hold up one of the typical ones there—our exhibits, they said there in that motion for summary judgment, we would object to the introduction of these exhibits in the trial——

The Court: Pass that to me, please.

(Document handed to the court.)

Mr. Alsup: —unless they are supported by affidavits from which we could determine whether or not cross examination is necessary.

And I say to your Honor that in my opinion they in-

terpreted the pretrial order as we did at that time. I believe this is an afterthought.

But if it can be interpreted that way, I believe this, in the interest of justice, our motion to amend should be granted.

The Court: Well——

Mr. Alsup: I might say, your Honor, counsel has advised me that if this evidence is admitted, these experts, Dr. Jenssen and Dr. Brown, who have been working on this for them, he proposes to call them in rebuttal and they are prepared.

[fol. 1732] Now why this would delay the trial I don't know.

The Court: Well, let me hear from counsel. Take the lectern there, will you, please—is this working now—all right. I guess you can stand there.

Mr. Coyle: If your Honor please, counsel has mentioned this exchange of exhibits, going back to June, I think it was, of 1960——

The Court: First let me ask you a question—maybe we can trim this down, reduce it down to its lowest common denominator, rid ourselves of any more semantics than we have already had.

First of all, you say you made a mistake, you thought that we were going on the theory that it was a part of the stipulation that there was intensive competition as between Von's stores and Shopping Bag stores, is that correct?

Mr. Coyle: I say that somebody made a mistake. I don't say that I made a mistake.

The Court: I mean you have been working on that theory.

Mr. Coyle: I have been relying upon this pretrial order as it was written. It has been amended twice.

The Court: Now, counsel, let's get down to specifics. I am talking specifically about Paragraph 46. Nobody is questioning your good faith at all. We are trying to [fol. 1733] solve a problem, that is all.

But as I understand your position, you are now contending that Paragraph 46 precludes counsel from raising the issue of competition between Von's stores and Shopping Bag stores.

Mr. Coyle: Yes, your Honor, just as I did a year and a half ago.

The Court: I see. Now, as a matter of law are you contending that that would not be relevant evidence—never mind this provision in the pretrial order, and let's assume it were not there—would it be relevant for counsel to produce evidence to show there was no competition, or there was so much competition as between Shopping Bag and Von's, absent Paragraph 46.

Mr. Coyle: I wouldn't want to stake the case on my contention on that basis.

The Court: You are not staking the case, counsel. I am just asking——

Mr. Coyle: I would contend that when they conceded that the relevant section of the country was the Los Angeles Metropolitan Area, for the purposes of judging the impact of this merger, that they then conceded that Los Angeles Metropolitan Area was the effective area of competition for these chains. And I think this——

The Court: Well, counsel, that is the whole pic-
[fol. 1734] ture.

Mr. Coyle: And I think that——

The Court: I concede more or less that you are correct in that contention, that looking at the contention as a whole, that is the line of commerce in the Metropolitan Area, that part is fine.

But do you say that it would be improper for me to permit testimony—absent Paragraph XLVI—as to the lack of competition, or competition as between the Von's stores and the Shopping Bag stores?

Mr. Coyle: I think that after having stipulated as to the section of the country being the Los Angeles Metropolitan Area, it would be improper to admit evidence as to competition in the——

The Court: Why? Why?

Mr. Coyle: Because the area of competition means the area in which these two firms compete effectively with each other.

The Court: Well, if that is the rule, if that is the rule then counsel's argument practically obtains, and that is, you are practically saying per se that this is——

Mr. Coyle: I am saying——

The Court: —this is an illegal merger.

Mr. Coyle: I am saying that these defendants stipu-

lated the line of commerce and the section of the [fol. 1735] country and that they competed intensively with each other, and that is two-thirds——

The Court: No, counsel——

Mr. Coyle: —and that is two-thirds of our burden.

The Court: Counsel, I am talking about absent Paragraph XLVI.

Now, let's assume it is out of the pretrial order, it is taken out. And you are now at trial without it.

If counsel offers evidence to show that there was not any competition, or there was very little competition between the Von's stores and the Shopping Bag stores, you say you would object to that testimony, is that correct?

Mr. Coyle: On the basis that they have already stipulated to the line of commerce and the section of the country.

The Court: On the line of commerce only.

Mr. Coyle: And the section of the country.

The Court: And the section of the country. So you would say that they are precluded from showing, as a matter of law, that there was no competition, or little competition between the two chains?

Mr. Coyle: But I would also——

The Court: That is what you are saying?

Mr. Coyle: I would also want to preclude their [fol. 1736] introducing evidence on the subject of competition between——

The Court: Well, I assume you would do that if the court ruled against you, you certainly would go out and produce evidence, if you could, to the contrary.

Mr. Coyle: Yes, I think much more than I would——

The Court: But that is not what I am talking about. I am talking about as a question of law. Now I am trying to get this case in a posture to where both sides will receive a fair trial.

Now, if this evidence is admissible, then counsel should not be precluded from putting it into evidence by mistake or misunderstanding over a provision in the pretrial order.

Now you agree with that, don't you?

Mr. Coyle: There is no question that we are trying to get at the truth here, and justice.

The Court: So that if there has been a mistake, and

as a matter of law this testimony would be admissible, then there ought to be a change in paragraph 46.

Mr. Coyle: I have no doubt about that. On the other hand——

The Court: Counsel, you—an admission in this court will not hurt you, believe me. It is not going to lose you the case, so don't be afraid to just frankly agree with something. It isn't going to win or lose the case for you. [fol. 1737] But this is only in the interest of fairness that I am trying to work this out.

Mr. Coyle: Yes.

The Court: I would do the same for you.

Mr. Coyle: Yes. I really resent some of the things that defense counsel is saying. I believe myself that——

The Court: Oh, well, after the case is over you usually get over those things, so don't let it worry you. You might be partners next year, you can't tell.

Mr. Coyle: Might be, your Honor.

The Court: That is something that clients can never understand, after lawyers call each other the names they do, they walk out in the hall and say, "Let's go have a light drink together," or something, they don't understand how quickly they can make up. So let's don't worry about the personal side of it. Let's worry about justice.

Well, I am disposed, counsel, to permit some kind of change in the pretrial order. But I can't compel a stipulation. And I think we ought to decide, as a matter of law first, whether or not that type of evidence would be admissible. And I think that will resolve the question.

What do you think, defense counsel?

Mr. Alsup: I believe it is admissible, your Honor, and I request this amendment, of course——

[fol. 1738] The Court: I know. Now——

Mr. Alsup: I believe it is admissible.

The Court: Under what, under the Brown Shoe case?

Mr. Alsup: The extent of overlap, your Honor, I think really does go to one of the peripheral issues, because the court has pointed out it is not the competition between the acquiring and acquired concerns which is the test, it is the effect on competition generally.

If I were a court, however, I would like to know if the companies which merged had stores, many stores, one on

one corner directly opposite the store of the other on another corner, I might feel that there was an anti-competitive purpose in the merger.

I do believe that it is one of the peripheral issues in the showing of a lessening of competition between the two, while relevant, is not the true test. You must show a lessening generally throughout the Metropolitan Area. But certainly I believe it is relevant.

The Court: Well, here is the problem I think that may be—one of the inherent problems in the case. In the Brown Shoe case you had both the vertical and horizontal problem.

Mr. Coyle: That is correct, your Honor.

Mr. Alsup: That is correct.

The Court: Now, in this case, I believe it is [fol. 1739] clearly understood we have only one problem, is that right?

Mr. Alsup: That is correct.

The Court: To-wit?

Mr. Alsup: Horizontal.

Mr. Coyle: Horizontal.

The Court: Horizontal, no vertical problem here, is that right?

So much of the language that we have referred to in the Brown Shoe case relates to the vertical problem, is that correct?

Mr. Alsup: That is correct, your Honor, even when they discuss the horizontal phase it relates back to the vertical.

Mr. Coyle: I wouldn't agree to that, your Honor.

The Court: Well, I think what we have to do is resolve the question of whether or not that evidence is admissible. And if it is admissible, then I think I have to permit some kind of an amendment in the pretrial order.

In other words, it would work in this way, it would permit both parties to present evidence, if they desire—if they could not stipulate—as to the relevant competition between the stores of Von's and Shopping Bag.

Mr. Alsup: We prepared, your Honor—I might say we had a hearing for several hours on the government's motion for declaratory restraining order. They produced [fol. 1740] their economist who testified and produced a number of exhibits, introduced a number of exhibits, and every one of those exhibits went to this question of overlap.

Mr. Coyle: May it please the court, that was long before any cases were decided.

The Court: That was before the Brown Shoe case came down. Judge Mathes, as a matter of fact—that was before the Brown Shoe case came down.

Mr. Alsup: That is correct, your Honor.

Mr. Coyle: It was also before the pretrial order.

The Court: Well, I would like to have this resolved, this point resolved. Can we go on with the rest of the case and leave this until morning, and let you gentlemen sleep over it?

Mr. Coyle: Yes, your Honor. One thing I would like to mention, if we lose this Paragraph XLVI, it may be we are going to have to present some evidence as to market shares in some of these communities.

The Court: Can't you stipulate to those things, counsel?

Mr. Coyle: I think they will be hard to stipulate to, your Honor.

Mr. Alsup: I don't think, your Honor, market shares in a particular community, when we have agreed to the relevant section of the country is the Los Angeles Metro- [fol. 1741] politan Area, has any bearing. It seems to me that counsel anticipates, when we filed our motion for the further pretrial order and you indicated we could resolve the question at the time of trial, they have been prepared and I believe they have Dr. Brown in the court room today.

The Court: How much evidence do you have already as to this overlap, or lack of overlapping as to the Von's and Shopping Bag stores?

Mr. Alsup: We have a survey covering——

Mr. Vaughn: Six expert witnesses, your Honor.

The Court: That is already before the court, isn't it?

Mr. Alsup: We haven't offered it in evidence.

The Court: I mean but you are prepared to offer it.

Mr. Vaughn: Yes.

The Court: That is what I meant. You are prepared on that basis.

Mr. Alsup: That is right, your Honor. And so have they prepared on that basis.

The Court: Well, I tell you what I think I am going to do. My experience is that you get nowhere in conference. I never could accomplish anything in conferences. If you

sit down and study, you can usually work these things out, and they are usually very simple.

[fol. 1742] And I would just like to leave it with you, leave the suggestion with you and you can think it over, suppose—well, it is rather difficult to do, but just along the line I was thinking, on line 20—I will start at the beginning, line 19:

"In 1958 the 20 leading chains of supermarkets in the Los Angeles——"

I take it that means the Metropolitan area—then strike out "including the two defendants in this action" and leave it "* * * competed intensively with each other and with the other grocers and firms engaged in the purchase, distribution and retail sale of groceries and related products in the Los Angeles area * * *"

Then would that not leave open to have evidence offered as to the defendants?

Mr. Coyle: I don't think so, your Honor, because the defendants in this action were among the 20 leading chains.

The Court: Well, then, you will have to—I am merely showing you that—you can add then the reservation, however, that the—with the reservation that either party may be permitted to introduce evidence and proof concerning the competition as between Von's and Shopping Bag.

Mr. Coyle: Then the stipulation is meaningless.

The Court: Well, it is meaningless but at least it [fol. 1743] puts it in the position to where—it is not meaningless as far as the whole is concerned.

Mr. Coyle: As far as I can see, it is meaningless.

The Court: I don't quite agree with you. Maybe you are right.

Mr. Alsup: The problem here, your Honor, is—Mr. Bates and Mr. Vaughn and I thought we were very careful in Paragraph XLVI——

The Court: Counsel, don't take this as a personal matter——

Mr. Alsup: No, no, your Honor.

The Court: Because I can easily understand, sitting up here it is easy for me to understand how the both of you, on both sides, could have misunderstood the situation.

Mr. Alsup: All it seems to me you would be doing is resolving an apparent misunderstanding between the parties.

The Court: What I was trying to do—here is my thinking—was to try to leave intact the proposition that the competitive area, the line of commerce and the competitive area remains the same, but that evidence would be allowed, permissible as to the competition between Von's and Shopping Bag.

Now, that doesn't mean that the court is going to [fol. 1744] base the case on that, but it is a factor that should go into evidence for consideration.

Mr. Coyle: I couldn't interpret that type of evidence to be anything but evidence tending to prove that the relevant section of the country is not the Los Angeles Metropolitan Area and that it is instead these various communities in which Von's and Shopping Bag stores are competing.

The Court: Well, then, suppose I allow them to strike out the whole paragraph 46, where are we?

Mr. Coyle: Then we are going to have to have a lot more evidence come in here on competition between the two firms. I don't know, you have to—if you strike out Paragraph XLVI and let them introduce other evidence, I think we are going to lose our stipulation on the section of the country, too, and we are going to end up as proving, trying to prove or proving that either the Los Angeles Metropolitan Area is the section of the country or, in the alternative——

The Court: I think that would be—if you can stipulate to that now, I think you can stipulate to that.

Mr. Coyle: This is part of the stipulation, I think that this flows from the stipulation.

The Court: Well, I don't know whether it does or not. But I can't see how you can preclude that evidence. I don't know how I can preclude that evidence.

[fol. 1745] Mr. Alsup: Your Honor, these concerns advertise throughout the area, each of them sought new sites for new stores throughout the area.

Mr. Alsup: That's right.

The Court: Counsel, first of all the general statement that they are competing in the same area is a general statement.

The Court: And it is true. And I think you have agreed that there is generally the competition in this area, to-wit, the Metropolitan Area, among all of these defendants.

Mr. Alsup: Generally, yes.

The Court: But then you want to come down and prove that as between the two defendants that there is so much competition actually between the two defendants.

Mr. Alsup: On the retail store level.

The Court: On the retail store level, that's right.

Mr. Coyle: I don't see the relevance in that——

The Court: Well, suppose I rule against you then, then it will have to go in.

Mr. Coyle: I don't see what relevance counsel claims for that evidence, unless he is really trying to prove that they don't compete with each other in the Los Angeles Metropolitan Area, I don't see what else that would be directed toward.

[fol. 1746] The Court: Well, I think that I am going—I am afraid that that evidence should go in, counsel.

Mr. Coyle: Well, that may be, but——

The Court: I am not saying it is determinative of the case. But I am just saying——

Mr. Coyle: I don't see the relevance, your Honor, unless you are going to strike Paragraph XLVI, and probably strike the paragraph relating to the line of commerce and section of the country.

The Court: Well, is it necessary to strike the line of commerce?

Mr. Coyle: And section of the country?

The Court: I wouldn't think the line of commerce was involved at all here. There is no dispute about the line of commerce being groceries, is that right?

Mr. Coyle: That's right, I meant the section of the country.

The Court: Well, you are over-complicating a simple situation.

Mr. Coyle: I think——

The Court: Well, I think you had better think it over tonight and see if you can't resolve it. If you can't, I will resolve it.

But I will again re-read the Brown Shoe case.

And I thought, I was under the impression that that [fol. 1747] type of evidence was in the case.

Mr. Coyle: It was in the case because we didn't have a stipulation as to the section of the country, that is why we had to exclude each section of the country. Once you prove the section of the country that these firms are competing with each other in that section of the country, then you don't have to——

The Court: I understand, counsel. You have covered it. But if the stipulation was a mistake on the part of counsel, this is to remedy a mistake. This is nothing more than I would do for you.

Mr. Coyle: I have no quarrel with the court's power to remedy a mistake and I think we should——

The Court: The question is how to do it, how to do it.

Mr. Coyle: That is right, how to do it and not delay the trial.

The Court: That's right, yes.

Now, would you state, Mr. Coyle, that—suppose the evidence showed that there was absolutely no direct competition at all—I am just, for the purpose of argument, I am saying this, as between Shopping Bag and Von's, not one competitive area as between them. Would you say that was important evidence?

Mr. Coyle: I would say without these stipulations [fol. 1748] it might be important evidence.

The Court: Well, that is just the point exactly. Now we finally brought it down to the crux. That is the point.

Mr. Coyle: It might be, I wouldn't necessarily——

The Court: It might or might not.

Mr. Coyle: It might or might not. If the other side were putting evidence of that type in and taking the position that it were important, I would want to have the privilege to meet that.

The Court: Well, I wonder if we took an adjournment now and you gentlement got together, if you can't work this out.

Mr. Coyle: I don't know, your Honor.

The Court: Do you suppose you can?

Mr. Coyle: I don't know.

The Court: You can at least try, can't you?

Mr. Alsup: Certainly, your Honor.

The Court: Well, I am disposed—gentlemen, I want to

say again when I read that paragraph over, that I was concerned about it, not from one side or the other, because in reading the briefs they seemed to run a little bit contrary to my interpretation of Paragraph XLVI.

Mr. Alsup: I hope, your Honor, I would never agree that a store in Santa Monica competes with a store in [fol. 1749] Lancaster.

The Court: Well, I think you and I, Mr. Coyle, say that he has agreed to that, is that right?

Mr. Coyle: He has agreed that the chains competed down there.

The Court: Including the two defendants.

Mr. Coyle: That is correct, competed intensively.

The Court: Intensively with each other. Now that can't mean but one thing to me, it is just plain old mid-Victorian English. It means that he stipulated that Von's and Shopping Bag were competing store by store with each other. That is in effect what it amounts to.

Mr. Coyle: Enough of them were competing——

Mr. Alsup: What it meant to me, your Honor, was that where they did compete, they competed vigorously or intensively. It does not mean that they competed extensively.

I draw the distinction between intense, which to me means vigorous, and extensive, which means all-embracing.

The Court: Well, it is really a difficult thing to understand, counsel, and I am afraid that whichever way the higher court ultimately rules on that, you would like it to be final, you wouldn't want to have to send it back for further hearing.

Mr. Alsup: No, your Honor.

The Court: So I suggest you gentlemen go out now [fol. 1750] and have a conference and see if you can't work this out.

In the interest of justice, I will certainly permit an amendment. I hope you can do it so that you won't have to call too many witnesses.

If you can't, I may have to strike it and try that issue.

Keep in mind, Mr. Coyle, that nobody is questioning the line of commerce. That is not involved.

Mr. Coyle: No, but the section——

The Court: The line of commerce has been stipulated.

Mr. Coyle: The section of the country I am afraid might be in question.

The Court: I don't think so, I don't think it is. I think counsel will still stipulate with you that section or the area—whatever you want to call it—the section is the Metropolitan Area of Los Angeles, the Los Angeles Metropolitan Area, and that as a whole all grocers are in competition with each other.

But that does not connote that they are in competition, squared off Shopping Bag against Von's.

I think you can work out a stipulation that will take care of it, and limit us to hearing that evidence, for whatever value it may have, whatever it may be worth—I don't know at the present time what value it will have. It [fol. 1751] seems to me you can work that out.

So if it is satisfactory now, we will take an adjournment.

Mr. Coyle: Fine.

The Court: And you can see what you can do.

Mr. Alsup: Fine, your Honor. Thank you.

The Court: Be prepared tomorrow to go on.

If you have difficulty, I will just say this, in the last resort I will probably have to just take that out of the pretrial order and go on with the trial.

Mr. Coyle: I will talk to counsel, your Honor.

The Court: I am sure you gentlemen—you are both, I take it you admit you can be termed experts in this line of endeavor.

Mr. Coyle: Mr. Alsup does, your Honor; I am still a layman.

The Court: An expert certainly should be able to resolve a simple matter.

Mr. Alsup: I think it is remarkable, your Honor, how many things we did agree on.

The Court: I think you have done a splendid job, counsel. And I say again no criticism is intended whatsoever as against either one of you. I can easily see how this misunderstanding could occur.

And I may be in error in the way I read this par- [fol. 1752] ticular paragraph.

Mr. Alsup: Your Honor——

The Court: But since counsel for the government takes the same position, it may be that we are right.

Mr. Alsup: That is the reason I move to amend, your Honor.

The Court: All right.

Mr. Alsup: While I didn't read it that way, I want to protect myself.

The Court: All right. We will stand in recess until 10:00 o'clock tomorrow.

(Whereupon, at 4:30 p.m., Tuesday, June 11, 1963, court was in recess until 10:00 o'clock a.m., Wednesday, June 12, 1963.)

[fols. 1752a-1755] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES H. CARR, Judge Presiding

[Title omitted]

No. 336-60-CC Civil

Transcript of Proceedings—June 12, 1963

* * * * * * *

[fol. 1756] LOS ANGELES, CALIFORNIA, 10:00 A.M.

COLLOQUY BETWEEN COURT AND COUNSEL

The Clerk: Case No. 336-60, United States of America vs. Von's Grocery for further court trial.

The Court: All right, gentlemen. Did you work out the problem?

Mr. Coyle: No, your Honor, we didn't work it out.

The Court: All right. I will settle it. I will allow testimony on this score. I won't waste any more time, it is a waste of patience and time. I will allow testimony.

Mr. Alsup: Your Honor, I made a motion for an amendment of that paragraph. May that motion be granted?

The Court: Well, I can't make counsel stipulate to that. I am not permitted to do that, but I guess when you get to the Supreme Court they can make findings that are final.

But they certainly did allow testimony in that case as to the competition between the—at least it indicates to me which would be between the individual defendants—and in this case between Von's and Shopping Bag.

Now whether it is persuasive in the case or not, that is another matter. But I will allow testimony on it.

If you have got affidavits in the file, all you have to do is, you have put in evidence already on it, the both of you.

[fol. 1757] Mr. Alsup: That's right.

The Court: So I don't know what I can do about the pretrial order, I suppose just strike that paragraph, I don't know.

Mr. Coyle: If your Honor please, the pretrial order, in paragraph 6 of the pretrial order, it has been admitted that they were competing.

The Court: Well, can't I allow them to amend their answer at this stage?

Mr. Coyle: I am not saying anything, but I just point that out.

The Court: Well, I am not going to exclude testimony, if they want to offer it. They have already offered it, as a matter of fact, on the question of whether or not there was —what the words "intensive" and "extensive" mean, only the dictionary knows, as far as I am concerned, in a case of this type. I don't know what it means. "Intensively," can you tell me what it means?

Mr. Coyle: I said strong yesterday.

The Court: Yes, but what does extensive mean?

Mr. Coyle: It means strong.

The Court: Well, what does intensive mean?

Mr. Coyle: I don't know what intensive means if it doesn't mean strong.

[fol. 1758] The Court: Intensive means penetrating. Extensive means broad.

So I suppose intensive penetration can kill you as quick as extensive, in competitive fights.

So I am going to allow testimony. The answer, you say, admits that?

Mrs. Coyle: Yes, your Honor.

The Court: What paragraph?

Mr. Coyle: Paragraph 6.

The Court: Will you find it for me, Mr. Clerk.

What is the date of filing, I can find it quickly then.

Mr. Alsup: There was an amended answer—I have a copy of it.

The Court: All right, lend it to me, will you, please.

The Clerk: This may be either the amended or the unamended paragraph 6, is it?

The Court: It is the original answer, this is the answer to the complaint.

The Clerk: Yes, I have the copy here too.

The Court: Well, this just says—you say paragraph 6?

Mr. Coyle: Yes.

The Court: That apparently is—it says "The defendant [fol. 1759] is without knowledge or information"—

Mr. Coyle: Read the last sentence, your Honor.

The Court: The last sentence.

Mr. Coyle: The last three lines.

The Court: You do, counsel, you admit it in your answer.

Mr. Alsup: I admit intensive competition, your Honor, and where there is competition we say it was intense.

The Court: Well, I don't know what intensive means. What does it mean?

Mr. Alsup: It meant vigorous to me, your Honor.

The Court: What?

Mr. Alsup: It meant, where they did compete they competed vigorously.

The Court: Where they did compete, but you don't say that, do you?

Mr. Alsup: Well, your Honor, consistently throughout this case, in our statement of facts and contentions of fact and law filed after that, in our preparation of our exhibits, we had always intended to show that there was a little overlap between the Von's and Shopping Bag stores——

The Court: I understand that there was some competition in certain areas, directly and specifically. But I thought you wanted to offer, and have offered testimony that in some areas there was no competition between these two [fol. 1760] groups.

Mr. Alsup: That's right, they weren't located near enough to serve the same customers.

The Court: But counsel has taken the position that you have precluded yourself on that issue. Isn't that your position?

Mr. Coyle: That is correct, your Honor.

The Court: Well, what do you want to do?

Mr. Alsup: Your Honor, as I indicated yesterday I would like to—I move to amend paragraph XLVI of the pretrial order. I think——

The Court: How can you do that with your answer standing the way it is?

Mr. Alsup: The pretrial order, your Honor, supplements the answer.

The Court: It supplements the pleading, yes, that is true.

Mr. Alsup: It would only be to supplement, to point out——

The Court: How do you want to amend it?

Mr. Alsup: I would amend it by adding, your Honor, that the defendants contend there were a few Shopping Bag stores located where they could compete with Von's stores.

The Court: Is that different from the language you gave me yesterday?

[fol. 1761] Mr. Alsup: I gave you some language——

The Court: You said yesterday "But defendants contend that there were not—" Wait a minute, I wrote it out very hurriedly—"Defendants contend that there was not substantial competition between Von's and Shopping Bag as such—" I wouldn't permit that because that is too general and it doesn't state, I think counsel is right on that score, that is too—why don't you put it down to what the facts are, that in some cases there was competition between the stores and in other cases there was not.

Mr. Alsup: I think that is a very good statement of it, your Honor.

The Court: There is always a simple way to do a complicated thing.

You object to that, do you?

Mr. Coyle: I object to amending the pretrial conference order, your Honor.

The Court: Well, I am overruling you now, here and now. It is going to be amended.

Mr. Alsup: Your Honor, may I ask Mr. Vaughn to prepare some specific language and submit it?

The Court: Well, this comes under the stipulated facts, doesn't it? So it will have to come out of there. I can't amend stipulated facts. Isn't this under the admitted facts?

[fol. 1762] Mr. Coyle: Yes, your Honor.

The Court: Well, I can't do anything about that. So we will just do this—paragraph XLVI——

Mr. Alsup: Your Honor suggested yesterday some very good language——

The Court: No, I am going to change it. I am going to come back within the line of the language of the Supreme Court, that they competed generally in the section—what do you call it?

Mr. Alsup: Within the Los Angeles metropolitan area.

The Court: Within the Los Angeles metropolitan area, and then—in other words, that there is a general competitive situation in the entire area period.

Mr. Alsup: But that evidence as to particular competition between particular Von's and Shopping Bag——

The Court: I am going to allow it, I am going to allow it. You have already put it in.

Now how much weight it will have I don't know, I don't know how much weight it will have because the ultimate decision is: May there be a substantial lessening of competition? That is the sole issue.

So we will just strike out—if counsel objects I will just strike the entire paragraph.

Mr. Coyle: If your Honor please, I object to amending [fol. 1763] the pretrial conference order.

The Court: I have overruled you. You might just as well give that up, counsel. You have been overruled on that. It is going to be amended.

Mr. Coyle: My position is clear——

The Court: All right. Then you don't care to participate any further, you are just making an objection, is that right?

Mr. Coyle: That is correct, your Honor.

The Court: All right. Then we will take over and we will do it without your help and assistance.

We will let it stand—in fact I will strike out the whole of XLVI, since counsel will not agree to it. I was going to have it read that: "In 1958 the 20 leading chains of supermarkets in the Los Angeles area, including the two defendants in this action, competed intensively in the general—in this particular trade area," in other words.

Mr. Coyle: Your Honor, I would agree to that.

The Court: I thought you were not agreeing.

Mr. Coyle: I hadn't heard the language, your Honor. I would agree to that.

The Court: All right. Now let's see if we have it.

We strike out the words "with each other and with other grocers and firms engaged in the purchase, distribution and—" through the word "and."

[fol. 1764] So it will be "competed intensively in the retail sale of groceries and related products in the Los Angeles area."

Now do you agree with that, counsel?

Mr. Coyle: Let me look this over, your Honor.

The Court: You had better write it out because I don't want to take advantage of you. But time is beginning to waste.

Mr. Coyle: "In 1958 the 20 leading chain supermarkets in the Los Angeles area, including the two defendants in this action, competed intensively," striking out "with each other."

The Court: "And with other grocers and firms engaged in the purchase, distribution and—" through the word "and" and I am putting in "retail sale of groceries and related products in the Los Angeles area."

Mr. Coyle: "In the purchase, distribution and retail sale of groceries and related products."

The Court: Do you want me to leave that in?

Mr. Coyle: Yes, your Honor.

The Court: All right, I will do that. So we will strike out then——

Mr. Alsup: Your Honor, that would create confusion if that were done because the words "purchase, distribution and retail sales" used in this paragraph XLVI modify [fol. 1765] "grocers and firms."

The Court: I don't see that it makes any difference. The sole question here is, on the horizontal level what happens to the competition, isn't that right? We are not concerned about what happens on the purchase of groceries in other states or how it affected other people, is that correct?

We are concerned solely with the question of a horizontal competitive situation. Is that the issue in the case?

Mr. Alsup: That is the issue in the case.

The Court: Is that right, counsel?

Mr. Coyle: That is correct, your Honor.

The Court: Then what difference does it make?

Mr. Alsup: No difference, your Honor, so long as this evidence is to the extent of overlap, if any is admissible.

The Court: Well, they had to purchase to sell.

Mr. Alsup: Yes, your Honor.

The Court: So I am going to leave it that way, counsel. Now are we in agreement now?

Mr. Alsup: Yes, your Honor.

The Court: I don't want to push you into an agreement if you don't agree, gentlemen.

So it will now read, paragraph XLVI of the pretrial [fol. 1766] order now reads:

> "In 1958 the 20 leading chains of supermarkets in the Los Angeles area, including the two defendants in this action, competed intensively in the purchase, distribution and retail sale of groceries and related products in the Los Angeles area."

Once again, is that satisfactory?

Mr. Alsup: May I take a moment, your Honor?

That is very satisfactory, your Honor, since counsel has agreed that the competition he is talking about is on the horizontal retail level, actually as you know——

The Court: Well, that is going to be the decision of the court on what the horizontal situation is. That is what I have to decide and that is what it is going to be.

Mr. Alsup: Yes. As you know, we have contended the relevant section of the country as to the purchase of groceries and related products is not the Los Angeles area. It has to be nationwide.

The Court: Well, that is what you gentlemen call peripheral, is it not? Is it not, or is it?

Mr. Coyle: I call it peripheral.

The Court: Well, it is an admitted fact in the pretrial order that they are engaged in interstate commerce. There is no question about that. All of these matters have to do with commerce you are agreed upon.

[fol. 1767] Mr. Alsup: That is right, your Honor.

The Court: So I have no problem about finding the interstate commerce feature.

It is solely a question of whether or not there may be a substantial lessening of competition. That is the whole issue in the case, as I see it.

Mr. Alsup: We have taken the position, your Honor, that suppliers are not in the case, because the purchase, being nationwide, the relevant market under this Temple Electric case decided a year ago is nationwide, I think we are in complete agreement on that.

The Court: Are you in agreement, Mr. Coyle? Is that agreeable?

Mr. Coyle: Your Honor, I think we should add two words there, "competed intensively among themselves."

The Court: No, I won't do it. You put it back right where it was. You really must think the court is naïve.

Mr. Coyle: No, your Honor, but I don't know what it means to say——

The Court: I am just telling you my ruling is simply going to be, counsel, that I am going to allow this evidence. If you object to it it is already in—it will be in—I am going to allow the evidence as to what the competitive situation was between Von's and Shopping Bag.

[fol. 1768] Now what persuasion it will have in the case I don't know. But I am going to allow it in evidence.

Mr. Coyle: I understand that, your Honor, but I was just wondering about this one stipulation, the way you changed it now, does this mean that these chains competed among themselves?

The Court: It means—counsel, to me it means simply that everybody in this area, in the metropolitan area were competing in this line of commerce. That is what it means to me, generally competitive.

In other words, if Von's closed down in all the spots that it had, I assume Safeway or somebody else would immediately move over into that area, somebody would. In other words, there is a general competitive situation throughout the country.

Mr. Coyle: Could we put the word "generally" in there then?

The Court: Well, I will be glad to do that. That doesn't help you at all, that weakens your situation. Is that what you want?

Mr. Coyle: All right. We will leave it the way it is.

The Court: All right.

Will you prepare—since you are the one that created the problem, Mr. Alsup, prepare a written order with [fol. 1769] that amendment.

Mr. Alsup: Yes, your Honor.

The Court: All right, gentlemen.

Now let's proceed. And I expect you to have your witnesses here ready to go, because there are no adjournments in this court because of absent witnesses. I have learned long ago that you can't let the lawyers look at the clock

and say, well, your Honor, I ran out of witnesses so we will have to adjourn.

So we don't adjourn. Proceed.

The Clerk: Your Honor, I have concluded marking the defendants' exhibits.

I have marked Defendants' Exhibits A to Z inclusive, and AA to AW inclusive, except that counsel informs me that Exhibit No. AH will not be offered or used.

(The exhibits referred to were marked Defendants' Exhibits A to Z, AA to AW inclusive for identification.)

The Court: Do you want to offer them now, counsel, at this time, or do you want to wait until your case, how do you want to do it?

Mr. Alsup: However your Honor prefers.

The Court: Whatever suits you gentlemen, it is all right with me.

Mr. Alsup: I gather Mr. Coyle——

[fol. 1770] The Court: I take it that a motion—you of course, you may have a motion at the end of the plaintiff's case, I don't know.

Mr. Alsup: Yes, normally I would, your Honor, I want a complete record.

The Court: Well, maybe we had better do it that way then.

Mr. Alsup: Your Honor, I transgressed a great deal yesterday on the court's time. I hope——

The Court: No, you didn't, you didn't trespass. We accomplished a great deal.

At least we found one problem in the pretrial order and I think we have solved that.

And I re-read the case again last night and I am tempted to disagree with both of you on some of the things in the case, and to agree with both of you.

I think the case, the Brown Shoe case on the facts, on the holding is very far reaching. But it doesn't cover the facts in this case.

Mr. Alsup: That is true, your Honor.

The Court: So the principles do cover this case, but there is a vital difference in that case and the thread or the theme running through even the horizontal case. To me it appears to be that the court could never get out of its mind the fact that this was a broad, national situation where the

[fol. 1771] vertical was causing a great damage, and with it the court even says in one place here, the size, the national size of it.

Mr. Alsup: That is correct, your Honor.

The Court: Apparently would affect the horizontal situation.

So the area really, while they were considering cities of 10,000 and their adjacent vicinities, they were really considering it, in my opinion, on the holding on the whole national setup. That is what it amounted to, despite the finding that they talk about.

And I am amused at parts of it about samples. Apparently you can come to conclusions that because a situation existed in St. Louis it would exist in Milwaukee also, I don't know.

Mr. Coyle: I believe they had 24 cities.

The Court: Yes, but the court plainly said that in some of the cities there was no evidence. And I was just wondering—I notice I marked one finding by the court that was rather amusing to me who has been trained in the old school of findings, and that was that—if I can find it, here is the finding at 340 by the Supreme Court which says:

> "* * * Each competitor within a given market is equally affected by these factors, even though the city in which it does business may differ from St. Louis in [fol. 1772] size—" and et cetera.

There is just a finding out of the clear blue sky.

But it is the Supreme Court.

And incidentally, before I leave the case I might say that I re-read again very carefully this portion of the decision which lists some of the factors to be considered under the horizontal aspects of a merger.

And that was, it says on page 334:

> "* * * Thus its validity in the face of the anti-trust laws will depend upon such factors as the relative size and number of the parties to the arrangement, whether it allocates shares of the market among the parties, whether it fixes prices at which the parties will sell their products, and whether it absorbs or insulates competitors * * *"

This is just some of the situations that did exist in the Brown Shoe case. Whether they will here or not, I don't know.

Go ahead, counsel.

Mr. Alsup: Your Honor, counsel have taken issue with the statement we made that Shopping Bag did not compete with its articles of incorporation. Its retail stores are still there to serve the public. They are still competing.

In this case it is of particular importance because our evidence will show there were very few overlaps between [fol. 1773] the stores of Von's and Shopping Bag.

The Court: How far a distance do you consider it necessary to be before there is an overlap?

Mr. Alsup: Your Honor——

The Court: Generally speaking. Of course I realize there can be no hard and fast rule, but generally speaking, the distances.

Mr. Alsup: Your Honor, I am told by Mr. Von der Ahe that it varies from a mile to a mile and a half, and in some cases and some areas up to two miles. And in some cases in isolated areas it could even go to as far as 5 or 25 miles.

The Court: Now, let's see——

Mr. Alsup: But generally speaking, to answer your question specifically, most of the witnesses, the Government witnesses and ours indicate a mile and a half to two miles distant areas.

The Court: Well, that would depend upon the population of the place, wouldn't it? In other words, if you were, say, in Beverly Hills where the traffic is becoming unbearable, a mile might make a big difference.

Mr. Alsup: Yes, indeed, your Honor.

The Court: Whereas if you were out in an open area where the lanes of traffic were relatively free, then it would be a different situation, wouldn't it?

[fol. 1774] Mr. Alsup: That is correct, your Honor. Mr. Von der Ahe has pointed out that his Reseda store when it was built had a drawing area of about five miles, as I recall. New competition moving into the area has greatly reduced——

The Court: Well, doesn't the traffic situation reduce?

Mr. Alsup: Very much so, your Honor.

The Court: All right, go ahead. But it would seem to me that it would.

Mr. Alsup: Counsel is saying that the courts have not confused the fact that a company, in effect, its instruments of competition remain in effect and it doesn't affect a merger. And they cite the United States vs. the Maryland-Virginia Milk Producers case decided by the Supreme Court. The problem in that case, your Honor, was that the largest wholesaler in the area took over the big independent retailer, distributor of milk.

The Court: Is that the damage suit that you are talking about?

Mr. Alsup: No, your Honor, that is the——

The Court: That was the United States against——

Mr. Alsup: The Sherman Act, and Clayton Act proceeding.

The Court: I see. I was thinking of the other Maryland [fol. 1775] case that came down right about the time of the Sunkist case.

Mr. Alsup: Yes. And as we say in this case, since there was little overlapping between the Von's and Shopping Bag stores, since the Shopping Bag stores still remained to compete, and since counsel concedes that competition is vigorous, as we understand it, and since they further concede the test of a violation is not the lessening of competition between the acquired and acquiring concerns, it is the effect on competition generally, and all of these——

The Court: Does counsel concede that? Do you concede that, Mr. Coyle?

Mr. Coyle: Concede what, your Honor? I don't know what that was.

Mr. Alsup: The test is not the competition between the acquired and acquiring concerns, it is the effect of the merger upon the competition generally.

Mr. Coyle: I say I concede that the Brown Shoe opinion said that when the act was amended no longer is competition between the acquiring and acquired the sole test, the court——

The Court: Well, I remember those words "the sole test," but I was wondering if you went along. Counsel said that he thought you conceded that the competition between the two merging parties was not of serious consequence.

[fol. 1776] Mr. Coyle: Counsel says I concede a lot of things, your Honor.

The Court: All I am trying to do is get an answer. Don't give me these State Department answers, please. I would like an answer when I ask you something.

Mr. Coyle: Your Honor, my position is that these chains in this area competed with each other, Von's and Shopping Bag, Von's and Ralphs and Von's and all the others, they all competed with each other. That is what makes this section of the country, the line of commerce, and that is part of the case. They competed with each other and they competed with these other chains, they are all competitive factors in general competition throughout this area.

The Court: Well, that is a declaration, general declaration of policy that could apply to the whole world.

Go ahead, counsel.

Mr. Alsup: I may point out, your Honor, that——

The Court: What I am trying to do is pinpoint an issue and I get no answer at all on it.

Mr. Coyle: Your Honor, he is talking about——

The Court: You can say no, you can say you disagree, counsel.

Mr. Coyle: I disagree.

The Court: And if you say that you disagree that settles it.

[fol. 1777] Mr. Coyle: I disagree with counsel.

The Court: All right, proceed.

When I used to try cases I never hesitated to tell somebody I disagreed with them, the court included.

Go ahead.

Mr. Alsup: Your Honor, counsel's next argument which we believe is per se argument is this "increase in concentration."

While we deny there has been an increase in concentration in this area, we do want to point out that you don't determine concentration simply because a number of small mom and pop stores disappear.

The A & P, for example, you know once had 15,000 small stores. It now has 4,000 stores.

The Court: Where?

Mr. Alsup: Supermarkets.

The Court: Where?

Mr. Alsup: Throughout the country.

The Court: That is what I thought you meant.

Mr. Alsup: Homer Mitchell commented to me recently, my partner, he said that it reminds me of two men watching a steam shovel and one of them said to the other, "Look at that mechanical monster——"

The Court: Yes, it put a lot of people out of work, there is no question about that. I have seen that in my lifetime. [fol. 1778] Mr. Alsup: And—may I finish, your Honor?

The Court: Yes.

Mr. Alsup: And he said that it put a thousand men working with shovels out of jobs.

And the other man said, "Be realistic. It has put 10,000 men working with spoons out of jobs."

The fact is, your Honor, the public has put a large number of small mom and pop stores out of business. It isn't the chains, the supermarkets, it is just public demand.

The Court: Well, I suppose a lot of people are out of work that didn't have to deliver every day.

Mr. Alsup: That's right.

The Court: So modern changes, as bad as they are, I guess we have to accept them, explosion in population, explosion in everything, we have to accept it I guess. It has its benefits and it has its setbacks.

Mr. Alsup: That's right, your Honor.

But as our evidence shows some—any number of stores, single store operators have succeeded. One of the Government witnesses, for example, was asked about our witness Mr. Crawford who runs a very successful single store at Five Points in El Monte. And he said very definitely that is a very successful operator, "Some have it, some don't. I [fol. 1779] guess I don't."

But your Honor, there are very, very many who do, as our evidence will show.

Basically, your Honor, we feel that the Government has advocated nothing here but per se test, substantial competitive factor, increase in concentration without any real examination into the economic realities, which examination, we are convinced, will demonstrate—or the affidavits will demonstrate—that this merger does not violate Section 7, does not have any tendency whatsoever to substantially lessen competition or tend to create a monopoly.

The Court: Well, the burden is on the Government to prove beyond, by a preponderance of the evidence. I take it that is the rule, is that right, counsel?

Mr. Coyle: Right, your Honor.

The Court: Proceed with your burden.

Mr. Alsup: Thak you, your Honor.

Mr. Coyle: If your Honor please, we have a witness coming in but he hasn't shown up yet. I presume——

The Court: Well, I just rang the bell on that. You have no witnesses present?

Mr. Coyle: Your Honor, I will——

The Court: I will let the defense put on its case. I am not going to be adjourning to wait for witnesses. I don't care if he is a professor of Hongkong University.

[fol. 1780] You have no witnesses?

Mr. Coyle: We have a witness but he hasn't gotten here yet, your Honor.

The Court: Well, that is just too bad then. Do you rest your case, do you?

Mr. Coyle: No, I don't rest my case, your Honor.

The Court: Well, I am about to rest it for you.

Mr. Coyle: I am going to say one thing, your Honor, right now.

I am not agreeing to this change in paragraph XLVI.

The Court: You are repudiating what you said a while ago?

Mr. Coyle: I am doing what counsel has done, I am standing, I am not agreeing to this change.

The Court: I thought you said a while ago you agreed to it.

Mr. Coyle: I did, your Honor, but I don't now.

The Court: You are repudiating it.

Mr. Coyle: I have changed my mind, your Honor.

The Court: I see. You have changed your mind.

Mr. Coyle: Yes.

The Court: All right. I will strike the entire paragraph from the pretrial order.

Mr. Coyle: Yes, your Honor.

[fol. 1781] Now, your Honor, we have, if your Honor please, yesterday when we submitted these various affidavits we neglected to mention that there are three affidavits, one from Mr. DeSilva, one from a man named Linden and

an affidavit or statement from the Bureau of the Census, all of which were filed January 15th. And we had intended to offer them.

The Court: Well, you certainly may. You are offering them now?

Mr. Coyle: We are offering them now. They were filed January 15, 1963.

The Court: Any objection?

Mr. Alsup: No objection, your Honor.

The Court: Admitted, they are admitted.

Mr. Coyle: If your Honor please, the witness has——

The Court: Let's get this done first. The exhibits are numbered what?

Mr. Coyle: They are not exhibits, I don't think they are exhibits. I think they will be copied into the transcript.

The Court: I know, but they are affidavits—they are the ones that are included in that——

Mr. Coyle: No, no.

The Court: Have they been filed with the clerk?

Mr. Coyle: No, there were several filed with the clerk.

[fol. 1782] The Court: Well, I want some way to identify them, that is the reason.

Mr. Coyle: Your Honor please, we have been identifying them by name. We offered several other affidavits.

The Court: All right. What are their names?

Mr. Coyle: DeSilva, Linden and a census certification.

The Court: Now where do you wish those put into the record, counsel?

Mr. Coyle: With the other affidavits.

The Court: All right. Now, are there any depositions to follow each of those, Mr. Alsup?

Mr. Alsup: No, your Honor, we did not take those.

The Court: All right. The reporter understands then they are going into the record.

Mr. Coyle: If your Honor please, I call——

Mr. Alsup: Your Honor, I would like to check the census figures which he has to make sure——

Mr. Vaughn: We have never seen that census, Mr. Coyle, you never showed it to us.

The Court: Well, show it to him.

Mr. Coyle: It is right here.

The Court: These documents were supposed to be shown [fol. 1783] to counsel prior to this time.

Mr. Coyle: I am sure they were, your Honor. Perhaps they overlooked them because there were many documents shown to them.

The Court: If they were filed I am sure they must have been served.

Mr. Coyle: Yes, sir.

Mr. Alsup: Was that filed January 15, 1962 or 1963?

Mr. Coyle: 1962, January 15, 1962.

The Court: Any objection, counsel?

Mr. Alsup: Yes, your Honor. I have an objection to this. I may be in error, but I do not believe this is what was filed with their motion for summary judgment. The document does not identify who the four largest were, the eight largest, the twelve largest, the 16 largest, the 20 largest, and any of the years in question. Refers to '48, '54, '58, it seems to me entirely meaningless.

Mr. Coyle: If your Honor please, the witness never identified the four largest.

Mr. Alsup: Well, we know, your Honor, there have been great changes in the identity of the firms.

Mr. Coyle: That goes to weight, your Honor.

Mr. Alsup: I am saying, your Honor, they have another exhibit comprising exact sales data and so forth from the [fol. 1784] firms in this area by the FBI which identifies the firms.

The Court: Well, I would admit them, counsel, but there again I think it goes to weight.

Mr. Alsup: Thank you, your Honor.

The Court: They are admitted.

Mr. Coyle: If your Honor please, I call Mr. Kenneth Craun.

The Court: Come forward.

Kenneth Craun, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Kenneth Craun.

Direct Examination.

By Mr. Coyle:

Q. Mr. Craun, would you state your place of business, please?

A. 11943 South Paramount Boulevard, Downey.

Q. And what is your occupation, sir?

A. Grocery.

Q. How long have you been in the grocery field?

A. Approximately 25, 26 years.

Q. Would you tell us some of your experience in the grocery field?

[fol. 1785] The Court: You mean what is his experience?

Mr. Coyle: Yes, outline his experience and background.

The Court: In a general way, what has been your experience?

The Witness: I have worked in the store, over-all for the store, I have run this market for 26 years, with the exception of three years I was in the Service. I feel I know a little about it.

By Mr. Coyle:

Q. In operating the business is it necessary for you to keep informed as to marketing conditions?

A. Yes, it is.

Q. How do you do this?

A. Well, by periodicals, by visiting surrounding markets, other markets in surrounding towns and in my own town, to keep up with what they are doing.

Q. And do you discuss your business with other members of the industry?

A. Yes, I do, frequently.

Q. On the basis of your experience and your observations have you formed any opinion as to whether the number of grocery operators in the area are increasing or decreasing?

Mr. Alsup: I object to the question, your Honor, on the ground it is immaterial and——

[fol. 1786] The Court: I will allow it. It is expert opinion, I take it, and the realm of experts, they can go all over the ground.

I will allow you to answer. Have you formed an opinion?
The Witness: I would say the number are increasing.
The Court: Based on what, on your observation?
The Witness: On my observation.
The Court: Go ahead.
Mr. Coyle: I didn't hear the answer.
The Witness: They were increasing.

By Mr. Coyle:

Q. The number of what is increasing?
A. The number of markets is increasing, the number of major markets is increasing.
Q. The number of major markets?
A. Major markets.
Q. And have you formed any opinion as to whether the total number of markets in the area is increasing?
A. There have been some independents close up in that area——

The Court: Now, when we say area, what area are we talking about?
The Witness: In the Downey, Norwalk, Bellflower area.
[fol. 1787] The Court: Downey, Bellflower, Norwalk.
The Witness: Yes, sir, in my area.

By Mr. Coyle:

Q. What about the general Los Angeles area? Have you formed any opinion as to the general Los Angeles area?

Mr. Alsup: Object, your Honor——
The Court: First of all, is he familiar with it? He may not be. This is a rather big county. There are people living in this county that have never been on the other side of the county.

By Mr. Coyle:

Q. Are you familiar with conditions generally in the Los Angeles metropolitan area?
A. Yes, I am. And I do know that from a statement made by Certified Grocers, which is an absolute fact, that there has been numerous independents closed for one reason or another.

Q. Were you familiar with the operation of Von's and Shopping Bag prior to the merger?

A. Yes, I was.

Q. What was your opinion of their operation?

The Court: In what way, counsel? That is calling for too general a conclusion, isn't it?

Mr. Coyle: What was your opinion as to their general financial solvency?

[fol. 1788] Mr. Alsup: I object——

The Court: I will sustain it. You haven't shown any foundation for that.

By Mr. Coyle:

Q. Were you familiar with the history of the Von's and Shopping Bag to the extent that they were expanding or opening new stores?

A. Yes, I was.

Q. What was your opinion as to that, sir?

A. I thought they were expanding with, normally, I know they opened a new store in Downey, Von's Company did. The Shopping Bag Company did. I knew they were expanding by observation. I see this all around our area.

Q. Were there any other chains comparable to Von's and Shopping Bag in the area?

A. In our area?

Q. In your area, and in the general area.

A. Yes, Ralphs, Safeway, Boy's, All American, McCoy's, Food Giant.

Q. Have you formed any opinion as to whether you are at an advantage or disadvantage in competing with these chains?

Mr. Alsup: I object on the ground it is too general, your Honor.

The Court: Well, I think we will save time, counsel, it [fol. 1789] is a rather general question but I believe we will save time. I will allow him to answer—because we are exploring the whole economic front and I suppose that if it comes in as evidence, I can disregard it if it is based too far on hearsay.

Go ahead, counsel.

The Witness: Would you restate that question, please?

By Mr. Coyle:

Q. Have you formed any opinion as to whether you are at an advantage or disadvantage in competing with these chains?

A. I am at a definite disadvantage.

Q. In what respect are you at a disadvantage?

A. Well, there are several. No. 1 is advertising. No. 2, locations. Locations are not available to the independent operator at this time, such as shopping centers.

And the purchasing of some of the commodities, I would say over 50 per cent of the commodities that are used in our total sales.

Q. What commodities, what would they be?

A. Well, mainly produce and meats.

Q. All right.

A. Bakery products.

[fol. 1790] Q. In what respect are you at a disadvantage with respect to those?

A. We cannot buy our merchandise on the same basis that they can, in that they are buying for—at this particular time for approximately 80 stores. And it puts us in a definite disadvantage. There has been times when our men that do buying for us have been unable to procure merchandise, due to the fact that it has been bought up by the majors, in large quantity.

And the merchandise that we do buy, therefore, costs us considerably more.

[fol. 1791] Q. Are there any other items other than produce that you are at a disadvantage?

A. Yes, many.

Q. Do you have any—do you know or do you have any information as to—

A. We are paying approximately three cents a pound more for beef than the majors. And bread, we are paying at least 5 per cent more for this product than the majors. And that would be about it.

Q. Can you give any specific examples with respect to any of these products?

The Court: By that you mean what, counsel? I don't understand the question.

By Mr. Coyle:

Q. Specific examples of purchases of these products.

A. There is one example that is of record.

Our poultry products this last particular year, in December, we bought a rather large shipment of fresh turkeys, in which the Von's Company bought some of, they were on the same truck.

After our load—we understood we had the whole load—we were told that 10 cases of those——

The Court: I won't listen to this. This is pure rank hearsay. It would be a waste of time. This is not opinion, this is just hearsay testimony as to facts.

[fol. 1792] Mr. Coyle: No, he is testifying as to something that happened to him.

The Court: He was just about to say what somebody told him, that is hearsay.

Mr. Coyle: No, your Honor, I think it is—

The Court: Yes, it is hearsay. I won't hear it, what somebody told him.

By Mr. Coyle:

Q. Mr. Craun, would you relate this incident which is developed in the deposition before the court, and leave out what somebody told you?

A. I didn't know I said what somebody told me. I am sorry.

A truckload of this product——

The Court: You just answer the questions now and don't become a lawyer. Just answer the questions.

The Witness: I'm not sure, your Honor, what——

The Court: Just answer the question.

The Witness: Please state the question again.

By Mr. Coyle:

Q. Would you relate the incident with respect to these turkeys which was developed in the course of a deposition?

A. We ordered a load of turkeys from the International Poultry Company. These turkeys were delivered.

[fol. 1793] I received them, checked the invoices, and

found that part of the load belonged to the Von's Company—10 cases of them, to be exact.

Looking on the bills, I found that they were billed at the rate of 39 cents a pound. We were billed at 41.

We immediately contacted the company——

The Court: This is pure, rank hearsay. But if counsel wants to let it go in, it is all right with me.

Mr. Coyle: He is stating what he read on an invoice.

The Court: Well, counsel, you can't testify what you read in a Sears, Roebuck catalog, unless—go ahead, go ahead—it is pure, rank hearsay is all it is.

He is entitled to give his opinion, based upon hearsay evidence, yes. But he can't testify as to hearsay.

Go on.

The Witness: After much bickering with the company and explaining why they could give Von's this price over our own, we finally received credit back and were billed then at the same rate that Von's Company was.

We were told that they bought from this company in such large quantities, that that was the reason, they pooled all of their stores combined, bought so much more than we [fol. 1794] did, that was the reason for the differential in price.

Mr. Alsup: I am having trouble hearing the witness, your Honor. I missed the last part.

The Court: Please speak up, Mr. Witness.

Would you read it——

Do you want it read back, the last answer?

Mr. Alsup: Yes, I would like the last part of the answer.

(Answer read.)

Mr. Alsup: Your Honor, it is so clearly hearsay, it seems to me so much of it, we might as well let it go in.

The Court: Well, counsel, as you know, there is a wide distinction—if you want to let hearsay go in, it is your privilege—but there is a wide distinction between testifying as an expert based upon hearsay matters that they have learned through the course of their training, but when they start to talk about what somebody told them, it is pure hearsay.

Go ahead, if you want to let it go in.

Mr. Alsup: I move to strike the last part.

The Court: I will strike it, what he was told.

By Mr. Coyle:

Q. Mr. Craun, have you formed any opinion as to whether [fol. 1795] the large chains in the area are increasing their shares of the grocery sales?

Mr. Alsup: I object, your Honor, on the ground it is immaterial.

The Court: I will allow him to answer.

By Mr. Coyle:

Q. Now, Mr. Craun——

The Court: What his opinion is. I will give it such weight as it is entitled to.

The Witness: My opinion is that they are.

By Mr. Coyle:

Q. Have you been aware of other mergers and acquisitions in the retail grocery business in this area?

A. Yes, sir. The Alpha Beta merger, the Food Giant, and Fox, Mayfair, one that is pending——

Mr. Alsup: I am sorry, I can't hear you, Mr. Craun.

The Witness: The one that is pending, Kroger, Market Basket.

By Mr. Coyle:

Q. Have you formed any opinion as to whether these acquisitions will affect the independent grocery retailers such as yourself in the Los Angeles metropolitan area?

A. Yes.

[fol. 1796] Mr. Alsup: Your Honor, I think foundation ought to be laid for that type of question. I object to it.

The Court: Well, what foundation, counsel?

Mr. Alsup: Well——

The Court: He has testified he is familiar with the general area.

Mr. Coyle: He has been in business 26 years.

The Court: He has been in the business for 26 years, his opinion is based on hearsay.

Mr. Alsup: And he is talking about large chains, some which have merged and some of which have not.

The Court: Well, I will allow him to answer.

By Mr. Coyle:

Q. What is your opinion, Mr. Craun?

A. Will you restate the question?

Q. What is your opinion as to whether mergers and acquisitions such as the Von's and Shopping Bag, will affect the independent grocery retailer such as yourself in the Los Angeles area?

Mr. Alsup: I object, your Honor, on the ground it is too indefinite.

The Court: Well, as a matter of fact, it is a question I have to decide. He is not going to decide it for me. I will have to make that decision.

So actually you are asking him to make a decision for [fol. 1797] the court, really, aren't you?

Mr. Coyle: I have asked him for his opinion as to——

The Court: I will allow him to do it. I don't have to follow his opinion. I can make my own independent judgment, I guess.

Mr. Coyle: I would say that is right, your Honor.

The Court: All right. Go ahead.

The Witness: Yes, sir, in my opinion it will, definitely.

By Mr. Coyle:

Q. In what respects?

A. Well, now, in this particular merger we have two markets in our particular area operated by one company that will—it is two sources of supply to the community, to this particular community, run under one head, practically overnight, by this merger.

Mr. Coyle: I have no more questions of this witness.

The Court: Cross examine.

[fol. 1798] Cross-Examination.

By Mr. Alsup:

Q. Mr. Craun, you testified that some independents, single store operators have closed up in you area, is that correct?

A. Yes, sir.

Q. Do you recall testifying, when your deposition was taken on April 16, 1963—I refer to page 17, counsel, lines 17 and 20——

> "Q. Isn't it a fact, Mr. Craun, that there are more single store operators in the Downey area today than there were in 1950?
>
> "A. Yes, I guess there are."

Do you recall so testifying?

A. Yes, sir.

Q. Do you wish to change that testimony now?

A. I believe that between 1955 and 1963 there has been growth in Downey and the surrounding community, and possibly more markets that are—definitely more chains.

Q. And more independents, you so testified?

A. And some have closed.

Q. Yes. But there are still very, very many stores in the Downey area to serve the population, isn't that true, Mr. Craun?

A. There are sufficient.

[fol. 1799] Q. Isn't it a fact that from your reading, your study of the industry, the biggest complaint you hear in the grocery business today is not that there are too few stores, but there are too many?

Mr. Coyle: Hearsay, your Honor.

[fol. 1800] Mr. Coyle: That is hearsay, your Honor.

The Court: No, he is testing his opinion. That is based on hearsay.

You know, I recommend to all your lawyers, just once in a while you dive into Wigmore and read some of it. It seems to be that lawyers nowadays have an antithesis to learning the rules of evidence. Why, I don't know.

Mr. Alsup: Do you wish the question read?

The Witness: Yes.

(Question was read.)

The Witness: Yes.

By Mr. Alsup:

Q. Now, Mr. Craun, you testified that as the result of the Von's and Shopping Bag merger, Von's now has two stores in the Downey area?

A. Correct.

Q. And you were referring to the Shopping Bag store in the Stonewood Shopping Center, is that correct?

A. Yes, sir.

Q. And how far away from your store is that?

A. About a mile and a half.

Q. That Store was there before the merger of Von's and Shopping Bag, wasn't it?

A. Yes, sir, it was.

Q. And are you referring also to the Von's store on [fol. 1801] Paramount Boulevard?

A. Yes, sir. Paramount and Florence.

Q. Incidentally, this Shopping Bag store in the Stonewood Shopping Center, that is in North Downey, isn't it?

A. Next to my home, yes, sir.

Q. But not to your business.

A. Not to my business.

Q. And you testified you were referring to the Von's store on Paramount Boulevard.

A. Yes, sir.

Q. How far did you say that was from your store?

A. That is approximately two miles.

Q. And that store was in existence at the time of the merger of Von's and Shopping Bag, isn't that right?

A. Yes, sir.

Q. Have you seen any lessening in competition since the merger of Von's and Shopping Bag took place in March 1960 in your area, Mr. Craun?

A. In my opinion, for my own business, no.

Q. Mr. Craun, you testified at your deposition that your sales in 1960 were $725,000.00 a year, is that correct?

A. Yes, sir.

Q. And that in 1961, after the merger of Von's and Shopping Bag, they increased to $750,000.00 a year, is that [fol. 1802] correct?

A. The approximate figure, yes, sir.

Q. And in 1962 they maintained their level at $750,000.00 a year, isn't that correct?

A. Yes, sir.

Q. Now, directly across the street from your store, Mr. Craun—and, incidentally, your store is about seven or eight thousand square feet, is that right?

A. Yes, sir.

Q. There is a large store of Alpha Beta, isn't that correct?

A. That is correct.

Q. And when was that store opened?

A. It was originally a Raisin's, and it was opened approximately eight years ago.

Q. And there are other stores in the Downey area which you compete with?

A. Yes, sir.

Q. Is there a Ralphs store at Rosemead and Firestone?

A. That is correct.

Q. When was that opened?

A. That store was opened about 1958.

The Court: May I interrupt, counsel, and ask him a question?

[fol. 1803] Mr. Alsup: Yes, your Honor.

The Court: From your experience in 25 years, what have you observed with respect to stores of other chains opening, when, say, one chain opens a store, do the other chains begin to come in to compete, or what have you observed?

The Witness: That seems to be the trend.

The Court: You understand what I am getting at.

The Witness: Yes, sir.

The Court: In other words, Standard Oil opens a filling station on one corner and then another oil company opens another one on another corner. Is that true in the grocery business?

The Witness: This seems to be very true in this business.

By Mr. Alsup:

Q. Is there a Great All American Market in your area?
A. Yes, sir.
Q. And where is that located?
A. At Rives and Firestone Boulevard.
Q. I see. How far is that from you?
A. Approximately one mile.

The Court: Is that the All American, counsel, that owns Alpha Beta?
[fol. 1804] Mr. Alsup: No, your Honor.
The Court: What is the name of the company that owns Alpha Beta?
Mr. Alsup: It was known as American Stores, then it changed its name to Acme Markets.
The Court: Acme Markets.
Mr. Alsup: Greater All American was organized back—that was organized by a man named Blaine Hutchinson in the early '50's, who left Alpha Beta to start his own business.

Q. Now, is there a Boy's Market in your area?
A. Yes, sir.
Q. Where is that located?
A. Approximately one-half mile.
Q. South on Paramount Boulevard?
A. South on Paramount Boulevard.
Q. And you testified that there was a discount house that recently opened in your area?
A. Yes, sir.
Q. Udisco?
A. Yes, sir, Udisco.
Q. Do they carry grocery products?
A. Yes.
Q. Have you read predictions in these trade papers that you referred to, Mr. Craun, that the discount houses are [fol. 1805] likely to put the supermarkets out of business by 1970 or 1975?
A. I have read opinions of certain people that think along those lines.

Mr. Coyle: Your Honor, just for——
The Court: That is purely speculative. I will not pay

any attention to it. It is a waste of time. What the trade paper says about ten years from now, I probably know as much as they do, don't you think I do, counsel?

Mr. Alsup: You know more, your Honor.

The Court: No, I wouldn't say that. But I don't — it has any weight at all.

Mr. Alsup: I don't think the latter did and I apologize for asking it to your Honor.

Q. Mr. Craun, have there also been a number of drive-in milk depots selling groceries as well as milk that opened up in the Los Angeles area in recent years?

A. Yes, sir.

Q. Are there any in your area?

A. Yes.

The Court: How about the wagons that are going around now selling to the coffee squads and keeping people from working? Do they sell groceries, too, now; are some of them beginning to sell groceries?

[fol. 1806] The Witness: Not to my knowledge.

The Court: Aren't some of the wagons that are going around on the streets now, haven't they developed in recent years that they have a grocery line?

The Witness: Not that I have noticed, your Honor.

The Court: You haven't seen those?

The Witness: No, sir.

The Court: Do either one of counsel know about those?

Mr. Coyle: I don't know about it, your Honor.

The Court: I wonder why I have so much time to see these things, I don't know. I don't understand it.

Mr. Alsup: I have got to the point, your Honor, in the last three years that whenever I take a drive I look at every grocery store I see.

The Court: I see.

Mr. Alsup: These drive-in milk depots——

The Court: It might be of interest to you to know that— I don't know how substantial it is but there are quite a number of these wagons that have a small line of groceries and produce, coffee and things of that kind.

Mr. Alsup: Yes, I have seen those, your Honor.

Q. You mentioned these drive-in milk depots, does the Rockview Dairy have any in the Compton area?

A. The Downey area?

[fol. 1807] Q. I mean the Downey area.

A. Yes, sir, they have two.

Q. Is this a new development in the last three years?

A. Yes, sir.

Q. These drive-in milk depots, are they permitted to sell the milk at cheaper prices that you grocers are, by the State law?

The Court: Counsel, you are getting over in the hearsay department yourself, aren't you?

Mr. Alsup: I think this is a matter of common knowledge.

The Court: Is it? All right. If it is common knowledge it is an exception.

The Witness: Yes.

By Mr. Alsup:

Q. And have you seen these drive-in milk depots operated by Rockview Dairy in your area?

A. Yes.

Q. When did they open up?

A. The original one has been open about seven or eight years. A new one opened within the last three years.

Q. Is milk an important draw item for grocery stores?

A. I wouldn't say it is a draw item, it is a must.

The Court: How much longer will you be, counsel, with this witness?

[fol. 1808] Mr. Alsup: I think five minutes.

The Court: I think we had better take the recess.

Before we do, I want the record clear on this paragraph 46.

As I understand it you are asking to be relieved of the stipulation included in paragraph 6 of the pretrial order, is that correct?

Mr. Alsup: That was 46, your Honor.

The Court: 46, rather, yes. Is that what you are doing?

Mr. Alsup: That is what I would desire, your Honor.

But I would like to make any position clear on it. I do not agree with the interpretation which counsel have put on it. But in view of the——

The Court: In view of the fact that a dispute has arisen,

and there seems to be a misunderstanding, I am not going to hold anybody to a stipulation.

Mr. Alsup: Thank you, your Honor.

The Court: And that would apply just as well to the other side. So I will not hold you to that stipulation, since you claim that there is a misunderstanding.

Mr. Alsup: Thank you.

The Court: That is the ruling of the court.

Mr. Coyle: I have a statement I would like to read.

[fol. 1809] We can't agree to any change in the pretrial conference order. We do not believe that there has been any showing of manifest injustice which would warrant a change in the pretrial order.

The paragraph in question is plain in meaning, in no way ambiguous. It is a straight statement of fact which repeats an allegation in paragraph 6 of the complaint, which has been admitted by the defendant in paragraph 6 of their answer. The facts were true when they were admitted and they are still true——

The Court: Counsel, you are making a speech.

Mr. Coyle: Well——

The Court: Court will stand in recess for ten minutes.

(Short recess.)

[fol. 1810] Mr. Coyle: If your Honor please, when the court adjourned I was about to make a supplemental objection to the pretrial conference order——

The Court: I have already ruled, counsel. You should have made your objection a long time ago.

You have gone out and worked up a long document and brought it in to read it. After ruling, you know it is really too late to object.

Mr. Coyle: Your Honor, I think——

The Court: I gave you ample opportunity, in fact, to discuss it fully.

Mr. Coyle: Your Honor, I think I have been objecting for the last two days and I am objecting now, your Honor.

The Court: Well, you are reading a long document, your objections are fully in the record.

What is it you want to read now?

Mr. Coyle: That is all I want to say. There has been

no showing which justifies change in the pretrial conference order at this time.

The Court: You mean in your opinion.

Mr. Coyle: That's right.

The Court: Because I have ruled to the contrary.

Mr. Coyle: We object to any amendment to the pretrial [fol. 1811] conference order.

The Court: All right. You are overruled.

It is stricken because it is obvious to the court that there has been a misunderstanding between counsel as to the paragraph 46, and I am not going to compel any counsel at any time in this court to stick by a stipulation if they were mistaken when they entered into the stipulation, in the interest of justice and arriving at truth.

I am going to rule that is now stricken from the pretrial order.

Mr. Alsup: Q. Mr. Craun, you testified that your sales increased from $725,000.00 a year to $750,000.00 a year from 1960 to 1961, and they remained at that level in 1962. Do you recall testifying at your deposition—I refer, counsel, to page 63 at line 26, as follows:

> "Q. Did you or did you not, after the merger, make the same rate of profit on your volume of sales as you did prior to the merger?
>
> "A. Yes."

Do you recall that?

A. Yes, sir.

Q. And do you recall this:

> "Q. And is it not a fact that after the merger you increased your volume of sales?
>
> [fol. 1812] "A. Somewhat."

Mr. Coyle: If your Honor please, this is something that is beyond the scope of direct.

The Court: I take it it is for impeachment purposes only, isn't it?

Mr. Alsup: Surely, your Honor.

The Court: I will allow it for that purpose only.

Mr. Coyle: He is not going to impeach——

Mr. Alsup: I have just one more question and answer to read——

The Court: Well, I agree with you that if it is not impeachment, it is not proper. I thought it was for the purpose of impeachment.

Mr. Alsup: Exactly, your Honor. He testified that the independent is at a disadvantage.

The Court: That is what I thought. And I thought you were now trying to show that his opinion is not supported. Go ahead.

By Mr. Alsup:

Q. And do you recall this question:

"Q. And the same was true of the merger, so far as the American and Alpha Beta was concerned, isn't that so?

[fol. 1813] "A. Yes."

You recall that?

A. Yes, sir.

Q. Now, you referred to some——

Mr. Coyle: Your Honor, I don't see how that is impeachment at all.

The Court: Well, I have ruled that it is, counsel. I think that is the end of it.

By Mr. Alsup:

Q. You testified that a single store operator faces disadvantage because Von's and Shopping Bag can advertise in the metropolitan newspapers.

A. Yes.

Q. Shopping Bag advertised in the metropolitan newspapers before the merger, is that correct?

A. Correct.

Q. And Von's advertised in the metropolitan newspapers before the merger, didn't they?

A. Correct.

Q. You said that they have the advantage in locations, in getting into shopping centers.

A. Yes.

Q. Both of those concerns, before the merger, could get into shopping centers, isn't that correct?

A. Correct.

[fol. 1814] Q. And you stated that they have some advantage in purchasing of commodities?

A. Yes.

Q. Did Shopping Bag, as a 38-store chain, have that advantage—if it was one—before the merger?

A. Yes, they had that advantage.

Q. Did Von's have?

A. Yes.

Mr. Alsup: No further questions.

The Court: Any redirect?

[fol. 1815] Redirect Examination.

By Mr. Coyle:

Q. When you testified that Von's Shopping Bag had advertising advantages, what do you mean, Mr. Craun?

A. Well, they can advertise in the metropolitan papers, one ad covers the complete chain. In the local papers one ad covers the complete chain. Where an independent, it takes the same ad, the same page for one store, as against 80.

Q. Now, you have testified as to these new stores opening in Downey over a period of time. What has happened to the population of Downey in the past 15 years?

A. Downey has increased very much.

Q. And these new stores that have come into the Downey area, have they been predominantly chain stores or independent stores?

Mr. Alsup: Your Honor, that is so vague and indefinite, "predominant"——

The Court: I will let him answer.

The Witness: Yes, it has been chain stores.

By Mr. Coyle:

Q. Has it been predominantly chain stores?

A. Yes.

Q. Well, insofar as numbers are concerned, have there been more independents or more chains?

[fol. 1816] The Witness: More chains.

The Court: But independents are still coming in, aren't they?

The Witness: Two Speedy Markets have come in.

By Mr. Coyle:

Q. How big is Speedy Markets?

A. They are quite small, more like a delicatessen, liquor store type thing, with some grocery items.

Q. And have the chains increased their share of business in the Downey area over the years?

Mr. Alsup: I object, no foundation has been laid——

The Court: How would he know, counsel?

By Mr. Coyle:

Q. Do you know?

A. In my opinion, they have.

Mr. Alsup: I move to strike the answer, your Honor, and object on the ground——

The Court: I will leave it stand, but I probably won't give it very much weight.

By Mr. Coyle:

Q. Now, you have referred to these various stores in the Downey area. What is the trading area from which you draw your customers, in terms of miles?

A. About four miles.

[fol. 1817] Q. Have any come from beyond the four-mile area?

A. Not too many.

Mr. Coyle: I have no more questions.

The Court: You have parking facilities, I take it?

The Witness: Yes, sir.

Mr. Alsup: May I have just a couple of questions, your Honor?

The Court: Yes.

Recross-examination.

By Mr. Alsup:

Q. You don't have very large parking facilities, do you, Mr. Craun?

Mr. Coyle: Your Honor, that is pretty vague, that question, "very large."

The Court: Well, counsel——

Mr. Alsup: I will withdraw the question, your Honor.

The Court: I will ask him. How big a parking facility do you have?

Now he is going to have to use "large," "small," or something else.

The Witness: We have, for our size of store we have ample parking.

[fol. 1818] The Court: How many parking spaces do you have, when it is full?

The Witness: Approximately 50.

The Court: Anything further, counsel?

Mr. Alsup: One further question, your Honor.

Q. You testified that Von's can now make savings in its advertising costs because one ad covers more stores.

A. Correct.

Q. Those savings that Von's has been able to make have not hurt your gross, and they have not hurt your net profits, right?

Mr. Coyle: That is argumentative, your Honor.

The Court: Well, I think it is.

Mr. Alsup: I will withdraw it.

That is all.

The Court: All right. Step down.

(Witness excused.)

Mr. Coyle: If your Honor please, I would like to call Mr. Richard Dick at this time.

RICHARD DICK, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?
[fol. 1819] The Witness: Richard Dick.
The Clerk: How do you spell that?
The Witness: D-i-c-k.

Direct examination.

By Mr. Coyle:

Q. Would you state your residence address for the record?
A. 1300 Indian Avenue, South Pasadena.
Q. What is your occupation, Mr. Dick?
A. Grocery.
Q. What grocery are you affiliated with?
A. Dick Markets, Inc.
Q. Where are they located?
A. 6015 North Figueroa, that is Los Angeles.
Q. What is your position with that market?

The Court: What is that address?
The Witness: 6015 North Figueroa.
I am vice president of the corporation and assistant secretary. And I act in a capacity as manager for the market.

By Mr. Coyle:

Q. How long have you been in the grocery business, Mr. Dick?
A. At this business address, I have been there 19 years.
[fol. 1820] Q. How long have you been managing the store?
A. I have been managing the store for the last 12 years now.
Q. Have you found in your capacity in the grocery business that it is necessary to keep informed as to market conditions?
A. Yes.
Q. How do you do this?
A. Well, I read manuals, periodicals, that is one way of

finding out what is going on. I talked to salesmen, to the businessmen in the industry. We exchange ideas and talk over things that are happening in the industry. And between them I get a pretty good idea of what is going on.

Q. Do you visit other stores in the area?

A. That's right.

Q. Where are some of these stores located?

A. Oh, I have talked to people in stores in Reseda, I have been to different luncheons where they have stores all over the city actually.

Q. Have you, on the basis of your experience and observations, have you formed any opinion as to whether the number of groceries, operators of grocery stores in the area are increasing or decreasing?

[fol. 1821] A. I would say the small stores are decreasing. The larger stores are increasing.

Q. On a net basis have you formed any opinion as to whether the total number of stores are increasing?

A. I would say they are decreasing—

The Court: Counsel, you will have to speak up louder because we are having difficulty hearing you.

Mr. Coyle: I am sorry, your Honor.

Q. Have you, from your experience, have you formed any opinion as to whether you are at a disadvantage or an advantage in competing with larger chains?

A. Well, I am definitely at a disadvantage.

The Court: That is your opinion?

The Witness: In my opinion, sir.

By Mr. Coyle:

Q. What do you base your opinion on?

A. Well, I base my opinion on several things. In respect to listening to counsel talk about Certified as buying, I belong to Certified and I buy from Certified. I have very little choice. I couldn't operate without Certified.

But buying direct is a better arrangement, if you are capable of buying direct. I can't buy direct in any quantity that will do me any good.

But in a respect of that nature—now you are talking [fol. 1822] like a Safeway or Ralph's or Von's, with ware-

housing of their own, they definitely have advantages that I don't have in Certified.

In my opinion, my opinion is if they didn't, they would belong to Certified.

Q. What items do you buy from Certified, sir?

A. Mostly dry groceries.

Q. Where do you purchase other items?

A. Well, if you are talking about produce, we buy produce on the produce market downtown, that is here in Los Angeles. And cold cut meats and things of that nature are bought from different houses scattered throughout the city.

Q. These are items that Certified doesn't handle?

A. All I am speaking of now, generally, yes, they don't, Certified does not have them.

Q. Have you formed any opinion as to whether you can buy produce and these other items as cheaply as the chains do? I am referring to the items you don't buy from Certified.

A. No, I——

Mr. Alsup: Your Honor, no foundation has been laid for this question, a man who is a single store operator, has been all his life——

The Court: Well, you know the thing I don't understand—perhaps I am just not far enough along in antitrust [fol. 1823] understanding, but I thought the issue here was whether or not there was a substantial lessening of competition by reason of this particular merger.

Mr. Alsup: That is right.

The Court: Now you are asking an independent grocer to testify because he is small and can't use the power of purchasing, if a chain has a better advantage.

Mr. Coyle: If your Honor please, I heard many, many hours of comment yesterday by Mr. Alsup as to the great advantage that these independents get from Certified.

The Court: That doesn't mean that I accept what Mr. Alsup says.

Mr. Coyle: No, your Honor.

The Court: I listened to him, but I don't have to accept anything he says any more than I accept everything you say.

But what is the relevancy of this testimony? I would like to know. I am not fully——

Mr. Coyle: We have a tendency here towards concentration in these large chains in which we are developing that the independent is at a disadvantage in attempting to compete with them, and if they grow larger the independent is placed at a greater disadvantage. And this is a relevant consideration.

The Court: I see. All right. Well, I think it goes without [fol. 1824] saying that—I don't think counsel would dispute you, maybe I am mistaken, that the chain has advantages such as the power of purchasing, larger amounts, greater amounts, and the facilities of warehousing, the advantage of greater advertising and those things.

Mr. Coyle: I would like——

The Court: Are they disputable items?

Mr. Coyle: I should hope not. I don't think they are, your Honor. But I think counsel wouldn't agree to those things.

Mr. Alsup: Mr. Coyle, we have agreed on a lot of things——

Mr. Coyle: Is it stipulated——

Mr. Alsup: We have stated in all of our affidavits, your Honor, our witnesses testified the chains have certain advantages.

The Court: Can we arrive at a stipulation, I don't want you to do it if you don't feel you should.

Mr. Alsup: I think then we get in conflict, your Honor, because our witnesses say the chains have certain advantages and single store operators have certain advantages and the picture——

The Court: Well, we can't stipulate to everything. I was just wondering if there wasn't something we could stipulate to.

[fol. 1825] Mr. Alsup: The facts are clearly set forth in these affidavits.

The Court: All right, go ahead. But I don't think it is subject to contest that 80 stores have a better buying advantage than one store. I don't think it is.

Mr. Coyle: I think that——

The Court: I think just plain common sense would tell one that.

Mr. Coyle: I should hope that is so, your Honor. But I don't get that from counsel.

The Court: All right, go ahead.

There is one thing that I learned early in life, and that is that lawyers, practically all lawyers do it, but I never did—never fight until you get in the ring. And don't fight over something that is valueless.

Go ahead, proceed with the battle.

By Mr. Coyle:

Q. Have you been aware of acquisitions and mergers of the retail grocery business in the Los Angeles area?

A. Yes, I have.

Q. Have you formed any opinion as to the effect which acquisition such as the Von's-Shopping Bag acquisition will have on the independent grocery retailers in the Los Angeles metropolitan area?

Mr. Alsup: Your Honor, I don't know what acquisitions or mergers he is talking about. I think the question is confusing and ambiguous.

[fol. 1826] Mr. Coyle: Let's ask the witness if he can state some of the acquisitions, other than Von's and Shopping Bag.

The Witness: Yes, I think I can.

By Mr. Coyle:

Q. Will you state them for the record?

A. You mentioned before, the Acme-Alpha Beta merger.

The Court: Has that actually taken place?

The Witness: Yes, it has, your Honor.

The Court: I see.

The Witness: And, oh, there have been acquisitions by Fox and Food Fair, whether that has completely finished or not I don't know. Their advertising will be so.

By Mr. Coyle:

Q. Any of the other chains that have made acquisitions except Mayfair?

A. No, there has been an acquisition—I have just noticed recently—of Kroger coming in from Market Basket.

The Court: You mean they are trying to, they haven't come in yet, have they?

The Witness: No, they are talking about how they are going to exchange their stock.

Mr. Coyle: I think they have signed an agreement, your Honor.

The Court: Have they? Has the Department approved that one, too, counsel?

[fol. 1827] Mr. Coyle: No, as I said yesterday——

The Court: I believe you are investigating that, you say.

Mr. Coyle: Yes.

The Court: So that is embryonic at the moment, isn't that right?

Mr. Coyle: Yes, that's right. I think that they have signed an agreement, subject to a stockholders' meeting.

The Court: All right. Go head.

By Mr. Coyle:

Q. Have you formed any opinion as to the impact which these acquisitions will have, including the Von's-Shopping Bag, will have on grocers, retail independent grocers in the Los Angeles metropolitan area?

A. Yes. My opinion would be that if they continue to make acquisitions like that in time it will be mostly large stores combined together to compete among themselves, let's put it that way.

Mr. Alsup: Your Honor, I move to strike the answer as not responsive to the question.

The Court: I will let it stand.

May I ask a question?

Mr. Coyle: Yes, your Honor.

The Court: Is this going to increase competition?

[fol. 1828] The Witness: I have to answer that this way, your Honor——

The Court: Well, can you first answer me "Yes" or "No," and then explain?

The Witness: Yes, it will increase competition, but only in this state. As the competition, or chains increase, it puts such a burden on independent stores I think that they will lose that competition entirely.

The Court: In other words, what you are saying, your

opinion is that the competition will increase, but it will increase between the chains.

The Witness: That is right.

The Court: Go ahead, counsel.

By Mr. Coyle:

Q. What will that increased competition do to the independents?

A. It should eliminate them and I think it is eliminating them now.

Mr. Coyle: I have no more questions, your Honor.

The Court: All right.

Cross-examination.

By Mr. Alsup:

Q. Mr. Dick, what were your grocery sales in your store in 1962?

A. I believe it was one million and close to four hundred thousand.

[fol. 1829] Q. Do you recall testifying in your deposition, Mr. Dick, that your gross sales in 1959 were $1,377,000.00?

A. I believe those were the figures we used.

Q. Your sales have increased?

A. No, we have not. You are talking about today, this year?

Q. I thought 1962, in 1962 they were one million four hundred thousand, you testified.

A. No, sir, not to my knowledge. You only asked me about——

Q. In fact——

The Court: Well, he said this, a million and close to four hundred thousand, that is what he said. He didn't give a specific answer.

By Mr. Alsup:

Q. Mr. Dick, what is the trading area of your store?

A. I would say the trading area of our store probably ranges in the area of about three miles.

Q. Do you believe that is different than most?

A. It is not like all others, I will answer that way.

Q. Do you recall testifying at page 10 of your deposition taken on April 17th, that you believed the average trading area of a grocery store is a mile to a mile and a half?

A. Yes.

[fol. 1830] The Court: I take it what you are saying is that yours is different.

The Witness: It is in an older area of town, your Honor, and we are not concentrated in population like some areas are in the city right now. In other words, people come a little farther to shop.

The Court: What do you attribute the—I take yours is a successful business, isn't it?

The Witness: I think it is, yes, sir.

The Court: What do you attribute your success to, the merchandise to sell or the personality or the way you handle the public?

The Witness: I would say it is more of a personal nature and we have a management factor where we are much closer to our customers.

The Court: You rely heavily upon the contact, personal contact with the customer, do you?

The Witness: Yes, we do, sir.

The Court: Go ahead.

By Mr. Alsup:

Q. Now, there is a Kory's store a little way north of you, isn't that correct?

A. Yes.

Q. That is about two or three blocks at the corner of York and North Figueroa?

[fol. 1831] A. Correct.

Q. And it is open 24 hours a day, is that right?

A. That is right.

Q. How many hours do you stay open?

A. We are open from 9:00 in the morning until 10:00 at night.

Q. Going a little bit further north, Mr. Dick, isn't there a new drive-in milk depot?

A. Yes, there is.

Q. When did that come into your area?

A. In the last four or five months, I would say, six months.

Q. Do you know at what prices their sell their milk?

A. It is cheaper—I have never been in there but I have been told it is cheaper than what we sell our milk for.

Q. Have you been by the drive-in milk depot?

A. Yes, it is on a corner.

Q. Have you noticed they advertise rather wide range of other grocery products?

A. Not a wide range.

Q. Sausage?

A. Not in this one.

Q. Bread?

A. Bread, milk, potato chips.

[fol. 1832] Q. Beer, delicatessen items?

A. I did not see those advertised.

Q. This drive-in milk depot situation is a relatively new development in this area in the last three years, is it not?

A. In my area, yes.

Mr. Coyle: Your Honor, I don't see the relevancy of this at all to the prior testimony of this witness.

The Court: Well, I think probably, counsel, it is a peripheral thing that is just showing the general conditions. I take it that is what he is doing, is that right?

Mr. Alsup: That is right, your Honor. And we have shown it through other affidavits, so I will drop that line of questioning, your Honor.

Counsel, I would like to refer to page 46 of the deposition of Mr. Dick.

Q. You recall testifying on April 17, 1963, Mr. Dick, and I quote:

> "Q. You haven't seen any lessening of that competition since the Von's merger with Shopping Bag, have you?
>
> "A. I wouldn't think so.
>
> "Q. It has been more vigorous, if anything, has it not?
>
> "A. It has to be, yes. That is a trend."

[fol. 1833] Did you so testify?

A. Yes, sir.

Mr. Coyle: I don't see any relevancy to this here. He has testified to that.

The Court: Well, it is in.

By Mr. Alsup:

Q. Now, you have indicated, Mr. Dick, that in your opinion a single store operator has difficulty in surviving. Do you recall testifying—I can't find my reference, I am sorry, your Honor—with reference to a Mr. Al Goldstein, former executive of the Boy's or Food Giant, who decided to become a single store operator last year?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. Do you recall saying——

Mr. Coyle: What page is this on?

Mr. Alsup: I am sorry, page 49.

The Court: Is this impeachment, counsel?

Mr. Alsup: It seems so, your Honor. He says that the single store operator can't compete. He testified as to people who are entering the business and successfully competing.

The Court: I see. All right. Go ahead.

[fol. 1834] By Mr. Alsup:

Q. "Q. You have no knowledge that he is a single store operator at the present time?

"A. Yes, yes, yes, I will go that far. I never saw the statement you are making at all. Frankly I think that Al Goldstein would like to own 100 stores.

"Q. I am sorry, I didn't hear that.

"A. I would think that Al Goldstein would love to own 100 stores. It is true that I have heard that he has a store in Burbank.

"Q. A single store operation?

"A. A single store. Now, we are talking about personal money. That is probably the extent of what he can do at the present time, I would assume, otherwise he would be a lot bigger than he is.

[fol. 1835] "Q. Do you expect Mr. Goldstein to be successful in this operation and grow?

"A. I can't see why he should not."

Do you recall that?

A. Yes.

Mr. Coyle: If your Honor please, I object to counsel—read the next question and the next answer also.

Mr. Alsup: No objection.

Mr. Coyle: Do you want to read it?

Mr. Alsup: "Q. Did you see in the trade papers that Mr. Goldstein had stated that he didn't like to be an executive——"

Mr. Coyle: I am sorry, I meant the following question.

> "That store is directly across the street from Von's store in Burbank, is it not?
>
> "A. I don't even know where the store is at. I just heard that Al Goldstein had taken over a store from somebody in Burbank. That is the extent of my knowledge."

Now what all of this proves, I don't know.

Mr. Alsup: It proves a single store operator——

The Court: Well, never mind, I will decide what it proves, counsel. You don't have to help me on that score.

Mr. Alsup: I am sorry, your Honor.

[fol. 1836] Q. You were asked by counsel about other acquisitions and mergers and you testified that Acme, American Stores had acquired Alpha Beta. You recall that was some time in 1960 after the Von's-Shopping Bag merger?

A. Yes.

Q. And prior to the time that Acme acquired Alpha Beta, it had not done business in this area, is that right?

A. Acme? Yes.

Q. Now, you said that Food Fair has taken over the remaining stores of the Fox chain.

A. Yes.

Q. Do you recall that?

A. Yes, I have heard that.

Q. Do you know anything about the Fox organization, about how it got started in 1954?

A. No, I do not know the history.

Q. You do know that they expanded very rapidly between 1954 and 1961, and then got into financial difficulties and bankruptcy, don't you?

A. That's right, I do.

Q. How many stores did they get up to, about 50 or 52?

A. I know they had over 30 stores. How many more, I don't know.

Q. Where a number of these stores sold off to single store [fol. 1837] operators out of the bankruptcy?

A. I heard that, yes.

Q. And Food Fair came in and is running the remaining 18 out of the bankruptcy court, isn't that correct?

A. I believe that is so.

Q. And you referred to the proposed acquisition of Market Basket by Kroger?

A. That is right.

Q. That has been announced in the trade papers?

A. Right.

Q. Now, Kroger is not doing business in this area at the present time, are they?

A. No, they are not.

Q. Is Kroger generally reputed to be the fourth largest chain in the nation?

The Court: Well, counsel, I think that is pretty well known. I don't know that this is proper cross examination.

Mr. Alsup: No further questions.

The Court: As a matter of fact, as I have been listening to you two gentlemen, I have just been checking over the pretrial order and I find most of the things that you are going into have all been stipulated to in the pretrial order and it has been stipulated, for example, that in the last 20 years there has been an increase in the size of the indi- [fol. 1838] vidual retail grocery store in the Los Angeles area, and in the same period there has also been an increase in the size of the individual grocery store, retail grocery store, in the other parts of the United States, and since 1940 there has been a decrease in the number of grocery stores that operate in the Los Angeles metropolitan area and during the same period there has been a decrease in the total number of retail grocery stores in the United States. I mean these things have all been stipulated to.

Mr. Alsup: Absolutely, your Honor. I would say a large

part of those exhibits go to the very things that were stipulated to in the pretrial order.

[fol. 1839] The Court: Well, his questions, I thought he was trying to prove—and that part is admissible—that opinion evidence, in their opinion there had been—and I haven't heard yet just what he said. I am not clear as to what he said about substantial lessening of competition, other than to say that he thought the competition would increase rather than lessen, didn't he say that, Mr. Coyle?

Mr. Coyle: I think that he said that the competition from the chains would increase and the independents were then going to go out.

The Court: I think that is what he said, that he thought in due time the independents would probably decrease.

Mr. Coyle: And that the chains would then have the market.

The Court: I see. All right.

But when we get off on all this other matter, it seems to me that we have a stipulation that they will decrease.

Mr. Alsup: The number of stores?

The Court: Yes.

Mr. Alsup: I have no further questions.

The Court: Anything further, Mr. Coyle?

Mr. Coyle: I have three questions.

[fol. 1840] Redirect Examination

By Mr. Coyle:

Q. Your personal contacts that you referred to, personal services to the customers, is that your way of competing with the chains?

A. One of the ways, yes.

Q. Now, you have talked about these new people, are they a serious factor in the competition in your area?

A. Not at all.

Q. Now, you have mentioned that a number of Fox stores have been sold, were a number of these stores sold to some of the chains in the area?

A. I can't answer all of this because I haven't seen their records.

Q. You don't know——

A. I don't know that.

Q. —as to whether they were sold to independents, do you know that?

A. Being exact, no. I have heard that some of their poorer stores were taken by independents. But the bulk of it or the nucleus of their operation was taken over by the chains.

Mr. Coyle: No further questions.

The Court: Step down.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I am just wondering, Mr. Alsup, if you [fol. 1841] couldn't stipulate that in lieu of this paragraph 46—admit rather than stipulate, you admit it and I will accept the admission and that will end the matter.

If you will admit the way I put it a while ago, that in 1958 the 20 leading chains of supermarkets in the Los Angeles area competed intensively in the purchase, distribution and retail sale of groceries and related products in the Los Angeles area.

You have already admitted that heretofore, so——

Mr. Alsup: Yes, your Honor. I admitted that.

The Court: Well, if you admit that it solves the problem. Then there is no problem left. That takes care of it.

You don't object to him admitting that, do you, Mr. Coyle?

Mr. Coyle: He can admit anything he wants to, your Honor.

The Court: Well, that is subject to the control of the court, I am afraid.

How many more witnesses do you have this afternoon?

Mr. Coyle: I have no more witnesses, your Honor.

The Court: Is that all your witnesses?

Mr. Coyle: Yes, your Honor.

The Court: Have you put in all of your documentary?

Mr. Coyle: Yes, your Honor. I am prepared to close. [fol. 1842] The Court: Do you want to check over, or are you prepared to close now?

Mr. Coyle: We will check over the documentary——

The Court: Well, I will give you an opportunity if you wish to.

Mr. Vaughn: Your Honor, before the Government rests its case we do have the deposition of John Marshall, one of their witnesses, that has not yet been received by the court.

The Court: They haven't offered it, have they?

Mr. Vaughn: No, that is correct. But they have offered the affidavit of John Marshall——

The Court: Oh, this is the deposition, you wish to follow that?

Mr. Vaughn: This is the deposition which I would like to have transcribed into the record after the affidavit of Mr. Marshall.

Mr. Coyle: I am a little puzzled, because I thought it was already in.

Mr. Vaughn: No, it is not.

The Court: Well, it may be put in and follow the same procedure. It will be filed with the clerk and the reporter will be instructed to copy it succeeding the affidavit of—this is the deposition of whom?

Mr. Vaughn: John B. Marshall.

[fol. 1843] The Court: Succeeding his affidavit, is that correct?

Mr. Vaughn: That is correct, yes, sir.

And in addition, if I may, your Honor, Exhibits A through G on the defendant's list of exhibits were all exhibits to Mr. Marshall's deposition. I would request that they be received in evidence.

The Court: Well, I assume they should be.

Mr. Coyle: Yes. There was one Government exhibit attached to this deposition.

Mr. Vaughn: There may have been. I am only offering the ones we attached to the deposition.

The Court: Well, do you want to offer the other one?

Mr. Coyle: We will offer the other one, your Honor——

The Court: Then all of the exhibits attached to the deposition will be admitted in evidence and they are Government's 1 and A, B, C and D, you say?

Mr. Vaughn: A, B, C, D, E, F and G, copies of which have been supplied to the clerk.

The Court: All right, they will all be admitted.

(The documents referred to were marked Defendant's Exhibits A to G, inclusive, and were received in evidence.)

The Clerk: What is the Government's number?

Mr. Coyle: Look at Government's 1——

[fol. 1844] The Court: I thought he said Government's, it can't be 1, so it is 1 to the deposition, isn't it?

Mr. Coyle: Yes.

The Court: So it will have to be—we will leave it in the deposition——

The Clerk: It is not in the deposition.

The Court: It is admitted.

The Clerk: There are no exhibits with the deposition.

The Court: Where are they, where are they?

Mr. Vaughn: May I inquire if you received the original of Mr. Marshall's deposition? I only have a copy.

The Court: One at a time, please. I can't follow three people at once.

Mr. Coyle: I will have to check it over the noon recess.

The Court: Then when you find it we will admit it.

The Clerk: We will file the original then?

The Court: Yes, the original will be filed.

The Clerk: This is a copy.

The Court: All right, find the original and we will file the original.

The Clerk: Yes.

(The document referred to was marked Plaintiff's Exhibit 1 for identification and was received in evidence.)

[fol. 1845] The Court: Anything else, gentlemen?

Mr. Coyle: No, your Honor. We will check it over the noon recess.

The Court: Well, you can close your case and if you find that through any inadvertence you have overlooked something I will allow you to reopen and put it in, of course.

Mr. Coyle: All right. Then we will close.

[fol. 1846] The Court: Now, counsel, you realize I have not read all of the affidavits.

Mr. Alsup: Yes, your Honor.

The Court: And I have not read all of the material that is before the court.

But you indicated you might have a motion. I think if you want to protect your record you had better make it.

Mr. Alsup: I would like to make a motion to dismiss,

your Honor, but request that the ruling on the motion be reserved until after we have been able to put on our case.

The Court: Can I reserve it under the rules at this time? I don't think I can, can I?

Mr. Alsup: Then I would like to withdraw our motion, your Honor, ——

The Court: You would like to what?

Mr. Alsup: I would like to withdraw our motion, your Honor, because I think it is very important in these cases to have a very complete record.

The Court: Well, I will tell you this much, from the very pretrial order itself, counsel, I don't think I could grant your motion. And from the testimony because the issues—I have read enough in the affidavits and I have read sufficient of the material on file to where there is a question [fol. 1847] presented to the court at this time that is a little different from what it will be after the full case is in.

Mr. Alsup: Yes.

The Court: For example, at this point I have to take everything in its most favorable light to the Government.

Mr. Alsup: Yes, your Honor.

The Court: And on that basis—I don't want to anticipate you, but I will probably have to deny your motion.

I am not indicating it will be any different later on, but —what is the rule on the motion?

Mr. Alsup: I have a very poor memory, your Honor.

Mr. Coyle: 41, your Honor.

The Court: 41?

Mr. Alsup: Your Honor, I would like to withdraw the motion in any event.

The Court: Counsel, that is entirely up to you, if you wish to make your motion, do so.

Mr. Alsup: No, because I fully intend to proceed with our case, your Honor, I desire to do so.

The Court: I don't think I have the power to reserve on that motion.

Mr. Alsup: Your Honor, I withdraw—I do not make the [fol. 1848] motion.

The Court: All right. We will stand in recess until 2:00 o'clock.

(Whereupon at 12:03 o'clock p.m., an adjournment was taken until 2:00 o'clock p.m. of the same date.)

LOS ANGELES, CALIFORNIA, WEDNESDAY, JUNE 12, 1963, 2:00 P.M.

The Court: All right, proceed.

Mr. Vaughn: Your Honor, we found out when court recessed that the original deposition of John B. Marshall was already on file with the court.

The Court: Very well.

Mr. Vaughn: And Government counsel has found the one document we referred to as an exhibit to that deposition and has marked it as Plaintiff's Exhibit 73, which I understand is in evidence.

The Court: Is that satisfactory?

Mr. Coyle: That is fine, your Honor.

The Court: It will be admitted in evidence.

The Clerk: Plaintiff's 73 in evidence.

(The document referred to was marked Plaintiff's Exhibit 73 and received in evidence.)

Mr. Alsup: If your Honor please, I offer in evidence the affidavits of the following single store operators who are witnesses for the defendant:

W. H. Crawford
J. R. Dahl
Cecil Dobson
Reynold Elkin
Joseph Goldberg
[fol. 1850] Albert Goldstein
Harlos Gross
Paul A. Hines, Jr.
John H. Irwin
O. W. Richard
Mrs. Leila M. Roberts
Robert Sherry.

The Court: All right. By the way, counsel, are you going to supply—I believe you have, have you not, —have you supplied, have you noticed what counsel has supplied me?

Mr. Alsup: Yes, your Honor.

The Court: And you have also done the same, is that correct? These are Plaintiff's Exhibits 1 to 71?

Mr. Alsup: Well, your Honor——

The Court: They are copies, is that right, Mr. Coyle?

Mr. Coyle: That is correct, your Honor.

The Court: So that I have these for my use.

Mr. Coyle: We also have interspersed the affidavits dealing with the particular exhibits, in other words——

The Court: Are all of the affidavits in here?

Mr. Coyle: All of the affidavits relating to the exhibits are in there, yes, your Honor.

[fol. 1851] The Court: Relating to the exhibits, but not all of your affidavits.

Mr. Coyle: But not the statements from industry witnesses.

The Court: That is what I thought.

Mr. Coyle: Just the ones introduced in evidence.

The Court: So I will have to resort to the original file, or to the exhibits to get that.

Mr. Coyle: If your Honor would like them in the binder——

The Court: I don't want to put you to a lot of trouble, counsel, but you have it here already.

Mr. Coyle: It is not—it is not inconvenient.

The Court: Would it be inconvenient—I like to mark them up and I cannot mark up the original file.

Mr. Coyle: This will be a copy of Exhibit 72.

The Court: All right. Then you are passing to me a copy of Exhibit 72 which contains all of the affidavits which are now in the present Exhibit 72?

Mr. Coyle: That is correct, your Honor. They are not affidavits, to make the record clear.

The Court: Of the narrative statements.

Mr. Coyle: Yes.

The Clerk: Do you want to mark that a copy?

The Court: Yes, mark that a copy.

[fol. 1852] You see, in this way I can make pencil marks on it, which I can't do on the original file.

Thank you very much.

Now, I have also here a copy of Exhibit 24.

Mr. Coyle: That is correct, your Honor.

The Court: And Exhibit 24 is the advertisements of Von's competitors retained in Von's weekly file from June 11, 1959, to February 4, 1960.

Mr. Coyle: That is correct, your Honor.

The Court: Submitted by defendants in response to paragraph 3 of plaintiff's motion for production of documents.

Mr. Coyle: Yes, your Honor.

The Court: Now, are these in evidence?

Mr. Coyle: Yes, your Honor.

The Court: All right. These are copies.

Mr. Coyle: It was just too voluminous to put in the other——

The Court: Now this is not the original, this is a copy?

Mr. Coyle: Yes, your Honor.

The Court: Fine. And I may mark it up.

Mr. Coyle: Yes, your Honor.

The Court: Fine. All right, counsel. Go ahead.

Mr. Alsup: If your Honor please, I offer these affidavits [fol. 1853] of these single store operators in evidence. May I approach——

The Court: Yes, certainly.

Mr. Alsup: I have here what is labeled an office copy——

The Court: I would like to have it, if I may.

Mr. Alsup: Yes, indeed, your Honor.

(The document was handed to the court.)

The Court: This will be marked Defendants' Exhibit what, Mr. Clerk?

The Clerk: This will be Defendants' Exhibit AX.

(The exhibit referred to was marked Defendants' Exhibit AX for identification.)

The Court: Now this is to be copied into the record also, is it? Or just——

Mr. Alsup: Yes, your Honor. That is what we anticipate.

The Court: Counsel, do I understand that also in addition to Exhibit 72, that——

Mr. Coyle: If your Honor please, that Exhibit 24 was offered the other day.

The Court: Yes. That is what I thought. It is not to be copied in the record—there is nothing to be copied into the record from this, as I understand, is that right?

[fol. 1854] Mr. Coyle: No, that is right.

The Court: Very well.

Mr. Alsup: As I understand it, your Honor, the only thing that will be copied in the record is the affidavit itself.

The Court: That is correct.

Mr. Coyle: That is correct, the affidavits and the statements.

The Clerk: Defendants' Exhibit AX is admitted.

(The exhibit marked Defendants' Exhibit AX was received in evidence.)

The Court: Yes. Will you mark my copy, please, Mr. Clerk.

You know, counsel, while we are on the subject, the more I think about it, I suppose that I ought to read all of this material, and then at the end of the case if you desire to file any additional memorandum to emphasize or summarize any of the testimony or any of the material in these exhibits you are welcome to do so. But I would like it done at a very reasonably early date.

[fol. 1855] Mr. Alsup: We have endeavored to do that, your Honor. You know we have summarized the documents which we have filed with your Honor and the documents, the testimony of the industry witnesses.

The Court: Yes. I thought you might have others, more than that though.

Counsel has introduced certain others that have not been summarized in his brief, as I understand it.

Mr. Coyle: No, your Honor. These two witnesses we added on this morning we also have statements.

The Court: Well, that won't be necessary, of course.

Mr. Coyle: Yes.

The Court: I have heard the testimony.

Mr. Coyle: Yes.

The Court: But all of the affidavit evidence you have has been summarized or averted to in your brief.

Mr. Coyle: Oh, no, your Honor. My understanding was that we are going to summarize——

The Court: You can if you wish. What I am saying is you can if you wish.

Mr. Coyle: Yes, but the——

The Court: Yes, I want you to understand it is not compulsory.

Mr. Coyle: I see, your Honor.

[fol. 1856] Mr. Alsup: I next offer in evidence, your Honor, and assume it will be Exhibit AY, the affidavits of the industry witnesses, defendants' industry witnesses who operate from two to nine grocery stores as follows:

Eugene Gelson.
Nathan Gilbert.
Marcus Godfrey, Jr.
Joe B. Goodnight.
Yoshi Inadomi.
Arthur C. Jones, Jr.
A. J. Miller.
O. J. Sloan.
Daniel H. Wilson.

The Court: It will be—Mr. Clerk, is that AY, is that right?

The Clerk: Yes, sir, Defendants' AY.

The Court: It will be admitted.

(Document referred to was marked Defendants' Exhibit AY and was admitted in evidence.)

The Court: That too is to be copied into the record, as I understand.

Mr. Alsup: Yes, your Honor. Thank you.

The Court: I only want to say one thing in advance. I hope that you put your best foot forward on these copies [fol. 1857] because some of the lawyers seem to feel that if they can give the judge a real bad copy he can't read he might rule in their favor. But I don't work on that theory. And I hope the copies are legible.

Mr. Alsup: I trust your Honor it is very legible. We are proud of these affidavits.

The Court: I am talking about planning, counsel.

Mr. Vaughn: I might say, your Honor, that you have the copy that we intended to keep for our own files. So it will be legible.

The Court: All right, thank you.

Mr. Alsup: I next offer in evidence, your Honor, Defendants' Exhibit AC, an affidavit of defendants' industry wit-

nesses who operate ten or more grocery stores in this area, namely:

Sam Alexander.
Claude W. Edwards.
Charles Futterman.
George F. Fitzpatrick.
Joseph P. Hughes.
Roger Laverty, Sr.
Richard Ross.
Neal D. Ramsey.
Ted. R. Wood.

The Court: As a matter of fact, you have summarized [fol. 1858] all of these in your, as I remember, some of them—you have summarized all of these, haven't you?

Mr. Alsup: I summarized those and I summarized the Government's industry witnesses and the depositions of the Government's industry witnesses, your Honor.

The Court: That is what I thought. Now that is ten or more, is that right?

Mr. Alsup: These are ten or more.

The Court: I wonder if you would help me out and go back to AX, how many do they own, one or more?

Mr. Vaughn: One.

The Court: AX.

Mr. Alsup: One store only, your Honor.

The Court: One store only.

And AY is one to 9, was it?

Mr. Alsup: Two to nine, your Honor.

The Court: Two to nine. I have it. Thank you.

Mr. Alsup: I offer Defendants' AZ, being the operators of ten or more grocery stores I have just referred to, your Honor.

The Court: Admitted.

(Document marked Defendants' Exhibit AZ was admitted in evidence.)

Mr. Alsup: I might say, your Honor, in connection with the affidavit of Joe Hughes, which is in the last exhibit, [fol. 1859] there are attached some forms from, order forms, from Certified Grocers.

The Court: Yes.

Mr. Alsup: Mr. Hughes is chairman of the board of Certified, as well as an operator of grocery stores. And those exhibits which are attached to his affidavit need not be copied in the record. I think they have been otherwise identified as our Exhibit H.

And I would offer that Exhibit H in evidence.

Mr. Coyle: That is Exhibit I, I think.

Mr. Vaughn: No, we changed that.

Mr. Coyle: I see.

The Court: So long as the reporter understands.

The Clerk: Your Honor they are now offering Exhibit H?

Mr. Alsup: Yes.

The Clerk: Is this the one you are referring to?

Mr. Coyle: Are you making the offer now?

Mr. Alsup: Yes.

Mr. Coyle: I object to this exhibit, your Honor. It doesn't prove anything.

The Court: If it doesn't prove anything why object.

Mr. Coyle: It is irrelevant.

The Court: What are these, counsel?

Mr. Alsup: They are order forms issued to members by [fol. 1860] Certified Grocers which indicate the very wide range of——

The Court: What they can purchase?

Mr. Alsup: ——products which the members of Certified can purchase.

And Mr. Hughes' affidavit—I don't have a copy of it before me now, your Honor, I have given you my copy—points to the wide range of products which members of Certified can purchase.

The Court: Well, I think I will admit it for whatever weight it may have on general conditions in the industry.

In other words, it may have some persuasive force, it may not. I don't know.

I assume that the thoughts you get concerning the area the better you are able to judge whether there is a lessening of competition.

Mr. Alsup: If your Honor please, I next offer as defendants' next exhibit in order—what is that?

The Clerk: BA.

[fol. 1861] Mr. Alsup: BA, the affidavit of three of the officers of Von's Grocery Company, namely:

Theodore A. Von der Ahe
W. R. Hayden
Charles Von der Ahe.

Mr. Von der Ahe is the president. Mr. Hayden is executive vice president and former president of Shopping Bag, and Charles Von der Ahe is the chairman of the board of Von's Grocery Company.

The Court: Any objection?

Mr. Coyle: Your Honor, I think I should point out that we deposed Mr. Von der Ahe and the deposition should be copied into the record.

The Court: After each, the same as we have heretofore done, after the copying into the record of the affidavit, then at that point copy in the deposition.

Mr. Alsup: You deposed Mr. Von der Ahe three times.

Mr. Coyle: The deposition on the affidavit was the last one we deposed.

Mr. Alsup: Very good.

The Court: Now, gentlemen, so the record will be clear at this point, I think it is clear, but let's be sure.

It has been understood throughout these proceedings leading up to pretrial and after pretrial and now that where these affidavits have been offered, that there is no [fol. 1862] objection and that counsel has had available, to both sides, to them the opportunity if they desire to cross examine by proceeding on deposition, is that correct?

Mr. Alsup: That is correct, your Honor.

The Court: Is that correct?

Mr. Coyle: With this reservation, your Honor, that there may be objections as to weight or hearsay statements——

The Court: I am not talking about that. I am talking about the opportunity to cross examine.

Mr. Coyle: That is correct, your Honor.

The Court: No one has been deprived of that. That is what I am talking about.

Mr. Coyle: That is correct, your Honor.

The Court: Whether it has weight or whether you want to object to it is another matter.

Go ahead.

The Clerk: Do you want counsel to identify which of the three depositions you are speaking of?

The Court: Yes, I think you should.

Mr. Vaughn: For your assistance counsel, it would be to the deposition to which you referred, the May 23, 1963.

Mr. Coyle: I have a problem here, which officers' [fol. 1863] affidavits are submitted.

Mr. Alsup: At this point Theodore A. Von der Ahe, W. R. Hayden and Charles Von der Ahe.

The Court: Did you get those, Mr. Clerk?

The Clerk: Well, the——

The Court: Get the first one first. Let's get them out and be sure we have them.

The Clerk: Yes.

The Court: That is what we want to be sure of.

The Clerk: I thought he said there were three separate depositions of Von der Ahe.

Mr. Alsup: There were, but counsel refers just to the last one.

The Court: He gave the date May 23, 19——

The Clerk: Here is one taken on May 4th.

The Court: That is not it. Give him the date again. It is May 23, is it?

Mr. Vaughn: 1963, your Honor.

Mr. Alsup: Do you have a copy?

Mr. Vaughn: We have the original. As a matter of fact—I apologize, we do have the original.

The Court: All right. The original is now filed with the clerk.

That is the original, Mr. Clerk.

The Clerk: The original of the deposition of Von der [fol. 1864] Ahe.

The Court: Which one, which Von der Ahe?

The Clerk: Theodore A.

The Court: All right.

The Clerk: Taken May 23, 1963. It will——

The Court: That will be copied into the record succeeding where his affidavit is copied.

Mr. Coyle: Correct, your Honor.

Mr. Alsup: That deposition has not been signed and notarized. If counsel wishes we will have it——

The Court: Do you wish it, counsel?

Mr. Coyle: No, your Honor.

The Court: All right.

Mr. Alsup: In connection with the——

The Court: Now, the next deposition, the next affidavit—we must get all three of them.

Mr. Alsup: No, your Honor, they did not depose any of our industry witnesses.

The Court: The other two Von der Ahes they did not?

Mr. Coyle: We did not depose the other two Von der Ahes.

The Court: All right.

The Clerk: That is Defendants' Exhibit BA, is that admitted?

[fol. 1865] The Court: Yes.

(The exhibit referred to was marked Defendants' Exhibit BA and received in evidence.)

Mr. Alsup: Attached to the deposition of Mr. Von der Ahe, your Honor, are certain exhibits. And I think we have supplied copies of those exhibits to Mr. Figg and had them marked Exhibit I collectively. And I offer those as well.

The Clerk: This one?

Mr. Vaughn: Yes, that is correct.

Mr. Coyle: If your Honor please, I object to those. There are pages and pages——

The Court: But, counsel, if they are part of the deposition and the deposition is going in, how can I understand the deposition without these? I don't think—what was this, on cross examination or direct examination?

Mr. Coyle: Direct examination, your Honor.

Mr. Alsup: Direct examination.

The Court: Well, I suppose technically he is right. Upon what theory can we put it in evidence, counsel?

Mr. Alsup: Your Honor, the Government witnesses consistently stated in their affidavits, just as Craun and Mr. Dick testified this morning, they have to be aware of market conditions in the area.

The Court: Is this what the opinion is based on, is that [fol. 1866] what you mean?

Mr. Alsup: In part, yes, your Honor.

The Court: Well, of course——

Mr. Alsup: They refer to trade papers, each of them——

Mr. Coyle: If your Honor please, I don't object to the trade, to the opinion——

The Court: Well, the basis of his opinion, you know you can always state the basis of your opinion, even though it is hearsay.

Mr. Coyle: But it is hearsay, it doesn't go into evidence, your Honor.

The Court: Well, it goes into evidence but it is not substantive evidence of the events or acts. It is merely the basis for the professional opinion, that is all.

Mr. Coyle: It is not evidence of any——

The Court: That is correct, that is correct. So it is not probative evidence of the facts recited here. It is only what is in support of his opinion. That is all. That is the exception to the hearsay rule.

Mr. Coyle: I think the exception is the opinion, but not the hearsay material. Some of the hearsay material——

The Court: Well, you are getting down to the rule in a condemnation case where some of the State courts have held that he can't give it on direct examination but on cross it [fol. 1867] can be elucidated.

But I think I will admit it here, not as probative evidence of what it contains, but merely what he considered in formulating his opinion. For that purpose only.

The Clerk: Defendants' Exhibit I in evidence. H was admitted, your Honor?

The Court: Yes, that was admitted.

The Clerk: Defendants' H and I in evidence.

(The exhibits marked Defendants' Exhibit H and I were received in evidence.)

Mr. Alsup: Your Honor indicated yesterday that there may be some of these that we would like you to read as a whole, some of these affidavits—I know it imposes a great burden upon you but——

The Court: No, I don't think that is necessary. I think I decided the best thing for me to do, the quickest thing is to read them myself.

Mr. Alsup: If your Honor please, I would like to turn it

over now to Mr. Vaughn who understands the facts of the figures and charts and statements, to produce the balance of our evidence.

The Court: Very well.

[fol. 1868] Mr. Vaughn: Your Honor, I don't know how well I understand the facts and figures and charts, but I will give this a try.

The Court: Now, on the facts, you are talking now about charts, I take it.

Mr. Vaughn: Well, in part. First I would like to start out by offering in evidence the affidavits of defendants' other industry witnesses. These are people who do not operate grocery stores but are suppliers or otherwise engaged in or connected with or intelligible about the retail grocery business.

The Court: They are suppliers of grocery products?

Mr. Vaughn: They are suppliers of grocery products, market consultants and others engaged in the trade.

They include:

Coker.
Charles Chamberlain.
Cyril C. Nigg.
Edward F. Pasini.
Cambell Stewart.
D. L. Childress.
Thomas H. Linden, Sr.
M. W. Engleman.
Clive W. Johnson.
Howard Kruger.
[fol. 1869] Franklin L. Miller.
Roy King.

And if I may approach the clerk, your Honor, I have the original and one copy of those affidavits.

The Clerk: I have marked this Defendants' Exhibit BB for identification.

(The document referred to was marked Defendants' Exhibit BB for identification.)

Mr. Coyle: If your Honor please, we object to the affidavit of the witness Childress because he relates to an

incident occurring outside of the Los Angeles Metropolitan area, which would be outside——

The Court: What is the incident, counsel? Tell me. Do you remember what it is?

Mr. Coyle: Yes, availability of the shopping center. He says that he had a location in a shopping center offered to him outside the Los Angeles metropolitan area.

Mr. Vaughn: Your Honor, that is not what the affidavit says at all.

The Court: What does it say?

Mr. Vaughn: It actually is a rebuttal affidavit, your Honor, of one of the Government witnesses, Mr. Paul Palmer who has a four-store chain called Country Cousins.

He said in his statement, which purports to summarize his testimony, that small concerns have a difficult time [fol. 1870] getting into shopping centers.

Mr. Childress is a real estate broker admittedly in Ventura, who signed up a shopping center which Von's also wanted and gave it to Country Cousins.

Mr. Coyle: Yes, but it outside——

Mr. Vaughn: And it is rebuttal, because Country Cousins is a concern which operates in Los Angeles metropolitan area. And while specifically it refers to Ventura, I think it is probative and of materiality in connection—particularly in connection with Mr. Palmer's testimony.

The Court: Where is his affidavit? I can't find it.

The Clerk: It is 39, your Honor.

The Court: There is no 39. There is a 38 divided by 39 here, is that the page?

The Clerk: I see the page isn't numbered itself. It has a tab on it which says 39.

The Court: Oh, I see, I see.

Mr. Vaughn: Your Honor, those affidavits were originally prepared not in that form, so the documents do not run in consecutive numbers. That is why we used the tabs.

The Court: Well counsel, what probative value does this have?

Mr. Vaughn: It shows that Mr. Palmer's statement about firms and concerns not being able to get into shopping [fol. 1871] centers was, to this extent, not true.

The Court: Well, it doesn't affect this area though.

Mr. Vaughn: That is correct.

The Court: It is outside of this area.

Mr. Vaughn: It may be so, but we are going into whatever understanding here, and we feel though that this evidence is of materiality because Country Cousins does business in Los Angeles area, the Los Angeles metropolitan area.

If your Honor feels that it is irrelevant for that reason we will withdraw it.

The Court: Well, I am afraid it goes outside—if we start to broaden the scope of the area for one purpose we may run into collateral matters for other purposes.

So I think I had better sustain the objection on that.

Mr. Vaughn: Very fine, your Honor.

The Court: I don't think it has a great deal of weight anyway, frankly.

Mr. Coyle: Your Honor, we also object to——

The Court: Just consider that the objection has been sustained to Childress and I won't read it.

Mr. Coyle: All right.

The Court: I have already read it anyway. So I won't read it again.

Mr. Coyle: We also object to certain publications or [fol. 1872] excerpts from publications contained in the affidavit of Mr. Roy King.

The Court: Why are they in there, counsel?

Mr. Vaughn: I don't know of any excerpts from publications in his affidavit.

The Court: Who is this we are talking about?

Mr. Vaughn: Roy King.

The Clerk: The bottom tab.

The Court: Yes, I have it, 45, Mr. King.

Would you point out to me where they are? I don't find them.

Mr. Coyle: I think I was wrong in that area, your Honor.

The Court: All right, fine.

All right, these will be admitted in evidence then. This is marked now exhibit——

The Clerk: Defendants' Exhibit BB in evidence.

(Document marked Defendants' Exhibit BB was received in evidence.)

Mr. Coyle: Now your Honor, I would like to offer the

affidavit of Mr. William Dover. I have the original and one copy of that and ask that that be marked Exhibit BC.

The Clerk: Defendants' Exhibit BC for identification.

The Court: Going back a moment to BB. When you use the term "other industry witnesses", is there any one classification I can put on here?

[fol. 1873] Mr. Vaughn: No, but the first in the categories are suppliers.

The Court: Suppliers and what else?

Mr. Vaughn: If I may see the original of that—the first five were suppliers.

The Court: All right.

Mr. Vaughn: Mr. Childress is out.

The Court: Just give me the category of the others, suppliers and what?

Mr. Vaughn: I can't, there is no category in which the rest of them will fit.

The Court: I will just put "Suppliers and." All right.

The Clerk: BC is marked for identification.

(The exhibit referred to was marked Defendants' Exhibit BC for identification.)

The Court: BC—any objection?

Mr. Coyle: No.

The Court: Admitted.

The Clerk: Defendants' Exhibit BC in evidence.

(The exhibit marked Defendants' Exhibit BC was received in evidence.)

The Court: That is the affidavit of Mr. William Dover.

Mr. Vaughn: Mr. Dover is presently a market consultant. [fol. 1874] But at the time he was with the Los Angeles Examiner Research Department. And he prepared the map which is over on the right-hand side of the courtroom showing the stores of the 37 leading chains in the Los Angeles metropolitan area as of June 1961.

I would like to offer, in conjunction with Mr. Dover's affidavit, Exhibits J and K referred to on our exhibit list.

Exhibit J is a statement or a report in narrative form from which is depicted graphically on the map which is Exhibit K.

The Court: The old saying, one look is worth hours of work, it certainly is true, isn't it.

Mr. Vaughn: It certainly is.

The Court: You don't have any way—is that going to be introduced as an exhibit?

Mr. Vaughn: I have just introduced it, your Honor.

The Court: That is what I thought. So if I need to look at it I can get that and look at it.

Any objection?

Mr. Coyle: No, your Honor.

The Court: Admitted.

(The exhibits marked Defendants' Exhibit J and K were received in evidence.)

[fol. 1875] The Court: I don't know that I want to take this with me. This is just a list of names and addresses.

Mr. Clerk, this is an extra copy, is it?

The Clerk: No, that is an original.

The Court: All right.

The Clerk: Do you have another copy?

Mr. Vaughn: We did have another copy, if your Honor would like it.

The Court: I don't know where I will store all this material, counsel. Maybe you had better comply with the rule and file the copy, if you have a copy.

Mr. Vaughn: All right. Would you like an extra copy of all our exhibits?

The Court: No, no.

Mr. Alsup: Your Honor, we do not have an extra copy of the map and it would cost several hundred dollars to make. I hope we won't have to make an extra copy of that exhibit.

The Court: I certainly won't, counsel. I for one have always believed in frugality in trials. If I had my way about it, there would be a slim record that would go up on appeal.

The Clerk: That is Defendants' Exhibits J and K admitted in evidence.

The Court: Counsel, I don't think you need to bother [fol. 1876] with that copy at this time. If you have an extra one you can give it to the clerk at a later time.

Mr. Vaughn: Very well, your Honor.

I also see that I overlooked Mr. Kruger's affidavit. He was one of the other industry witnesses.

Our Exhibit AF which I would like now to offer in evidence. Exhibit AF—Mr. Kruger was an employee of Kroger Company in 1957. He came to Los Angeles at the behest of his employer to look at three grocery chains which Kroger was interested in acquiring.

They were Von's, Shopping Bag and Alexander's. He did a survey of each of the stores of those chains. And these are the conclusions, among other things, that there were no Von's and Shopping Bag stores in competition with each other in 1957, with the exception of two stores in Whittier.

And as to those, there were other stores that were in more important competition than Von's and Shopping Bag were with each other. That is his report, Exhibit AF.

The Court: In other words, this is what he would have testified to if he had appeared here and testified.

Mr. Vaughn: That is correct. The affidavit supplements that to some extent.

The Court: Any objection?

Mr. Coyle: That is going only to weight, your Honor. [fol. 1877] The Court: That is right, counsel. It may have no weight, but if it has any weight it is for the court to decide what weight it may have.

Mr. Coyle: Also to relevancy, because it was previous, some three years before this acquisition took place.

The Court: Well, you talk about the Supreme Court says you must get all the conditions leading up to and following. Isn't that what the court says?

Mr. Coyle: Industry structure, your Honor.

The Court: That's right. Well, this is a part of the industry, isn't it?

So I will admit it.

The Clerk: Defendants' AF admitted.

The Court: It comes in two things, it comes in the line of commerce and it also comes in the metropolitan area. So it is in both categories.

I will admit it.

Mr. Vaughn: I also might say this, Mr. Kruger obviously wasn't paid by Von's to make that survey. He was doing it independently.

(The exhibit marked Defendants' Exhibit AF was received in evidence.)

[fol. 1878] Mr. Vaughn: Now, as Exhibit BD, I would like to offer in evidence the affidavit of Dorothy D. Corey. Mrs. Corey is the president of a concern known as Facts Consolidated, doing market research, a market research organization.

She has prepared a number of maps and exhibits and so on which are referred to in our affidavit.

The Court: Any objection, counsel?

Mr. Coyle: Your Honor, the Corey exhibit, also the Kruger exhibit, are subject to this other objection that they go into this store-by-store competition, which was covered by paragraph 46 of the Pretrial Order, and also by the admission that the defendants made in paragraph 6 of their Answer.

So we do object, we feel that this evidence is inconsistent with their answer, now that the pretrial order has been amended.

The Court: I will admit it.

Mr. Coyle: We also have a deposition of Mrs. Corey that ought to be placed in the record.

The Court: You may waive your objection, counsel. Do you want to put it in?

Mr. Coyle: I don't think so, your Honor.

The Court: All right. You may put it in. It will be copied in, this affidavit of Dorothy Corey will be copied in the record and following will be the deposition taken [fol. 1879] when she—what date did she give it?

Mr. Coyle: It was a week ago.

The Court: I see. All right.

The Clerk: The affidavit is Exhibit BD, which is in evidence.

(The exhibit referred to was marked Defendants' Exhibit BD and received in evidence.)

Mr. Vaughn: Your Honor, Mrs. Corey in her affidavit refers to a number of exhibits, Exhibits M through R all relate to a study which Facts Consolidated did for Von's and Shopping Bag in October and November of 1959—I beg your pardon, they were retained by O'Melveny & Myers

to do a survey to determine the extent of overlap between the Von's and Shopping Bag stores that were nearest to each other in the Los Angeles metropolitan area.

What she did was go out and interview people in the Von's and Shopping Bag store parking lots and determine where they did most of their shopping. She then tabulated that in her report, which is Exhibit M.

She then prepared maps—and if I can move over here I can find a copy——

The Clerk: Everything but N is a chart, isn't it?

Mr. Vaughn: That is correct.

She then prepared these maps which are Exhibits M [fol. 1880] through R which plot by dots the location of the customers of Von's and Shopping Bag stores which she surveyed, hopefully depicting the drawing areas of these particular stores, and I think showing that the draw areas of these stores were, in most cases, distinct.

Mr. Coyle: If your Honor please, in deposition we established that each of those dots represents more than one customer, more than one customer interview as part of the sample, but it didn't represent——

The Court: It is nothing but a sample poll, is all it is, isn't that what it amounts to?

Mr. Coyle: That's right, but the dot doesn't represent one customer, it represents a number of customers, 20 or 30 or 40 customers in a given area.

The Court: Well, this is a sample, a sampling program, wasn't it?

Mr. Coyle: That is correct, your Honor.

The Court: So you can't tell how many it may represent, is that correct?

Mr. Coyle: I think you can tell how many it represents because it was sampling customers of a given store and they were figuring customers as to the total number of customers that a store has. If it is a sample then each of those interviews would be representative of a portion of the total patronage of a store.

[fol. 1881] In other words, if the store had 3000 customers and you interviewed 300, then each sample would represent 10 customers.

The Court: I don't follow you, I just don't follow that.

Mr. Coyle: Well, these samples are projections.

The Court: I understand that, but you say they represent——

Mr. Coyle: They did show that one customer would come from that area, but on a projection basis it would represent 20 customers.

The Court: How can you come to that conclusion? I mean, how do you arrive at that?

Mr. Coyle: That is the way projection samples are made. For example, if the sample represents one-tenth of all of the customers of the store, then you interview——

The Court: That part I understand. But I understand you are saying that if they interview one person and then you project it out, prognosis, I guess is what it is, by saying, that, well, that represents so many customers for that area. Is that what you are saying?

Mr. Coyle: I think that is what it means, yes, your Honor. In other words, it doesn't show that this store is just drawing one customer from that area. It shows that this store, they are projecting this on many customers.

[fol. 1882] The Court: Is that your interpretation, counsel?

Mr. Vaughn: Well, I think I will let Mrs. Corey's deposition speak for itself on that score. Obviously they didn't plot the location of every Von's and Shopping Bag customer. They took a sample. And it may be that a particular person living at a particular address is representative of the general community from which other customers are drawn——

The Court: That I understand, that part would be in keeping with what I have been thinking.

But when you start to pin it down to a certain number, then I don't quite understand it.

Mr. Vaughn: Mrs. Corey, as she testified, made no determination of the percentage of samples of the total number of customers; she knows how many she sampled, but she does not know what the total universe was, that is, how many total customers of any Von's or Shopping Bag store had.

But she very adequately explained in her deposition that it was irrelevant for her to know that because it is the size of the sample, not the size of the universe which governs the validity of the sample.

Mr. Coyle: She also testified that the sample was projectable, your Honor.

The Court: Yes. Well, I can see how it may be project- [fol. 1883] able, but on that basis it is a little difficult—in other words, let me see one of those, will you, Mr. Clerk, please.

[fol. 1884] I certainly want to understand it before I start to look at it.

(The exhibits were handed to the court.)

The Clerk: That is Exhibit R.

The Court: Exhibit R. I am looking at now and I find red and green markings.

Now, the red I take it are Von's is that right?

Mr. Vaughn: That is correct, your Honor.

The Court: The green are what?

Mr. Vaughn: Shopping Bag.

The Court: Now it says "Table Depicting the Residences of Von's and Shopping Bag Stores as of December 1959," showing there was little if any overlap in the draw areas of Von's and Shopping Bag stores located in Monterey Park.

Now I take it you say that her deposition shows, both the affidavit and deposition show—there is both an affidavit and a deposition.

Mr. Vaughn: Correct.

Mr. Coyle: Yes, your Honor.

The Court: —show that she went throughout these neighborhoods interviewing customers.

Mr. Vaughn: She stood in the parking lot of the Von's and Shopping Bag stores and asked the customers, obvious customers of the store who were in the parking lot various [fol. 1885] questions along the line of, "Where do you do your marketing, where do you do most of your grocery shopping?"

The Court: Now, if there were a thousand customers in a Von's store and she interviewed——

Mr. Vaughn: She interviewed about 300.

The Court: About 300. All right. Then she would take—suppose she got 10 from one area, she would project that out by multiplying 10 times, is that right?

Mr. Vaughn: She would put 10 dots on the map at the

intersection closest to their residence. In other words, let's suppose that I was interviewed in one of those parking lots and I said that I lived near the corner of Bowling Green and Sunset. She would put one dot at Bowling Green and Sunset.

Now Mr. Coyle is making the argument that that may represent more than one customer.

The Court: It certainly may, and probably does. But I am trying to find out how the projection works, how it works.

Mr. Coyle: If she had projected it, each dot would have, she would have figured out a ratio——

The Court: That is the point, how do you arrive at that ratio. You take the number of people that she interviewed and ratio it to the number of customers.

Mr. Coyle: The total number of customers of the Von's [fol. 1886] store.

The Court: And then from that you conclude that if she hit 10 from one area, that would account for one-tenth.

Mr. Coyle: That is right.

The Court: I see now. Now I understand you.

Mr. Vaughn: But there is no evidence in the record as to how many customers any of these stores had. This is only intended to reflect a pattern of buying in this particular community, not to go down to the last customer and the last dot and show where he lives, but only to give a graphic representation of where most of the customers of these stores——

The Court: It is a sampling to indicate the location of the customers.

Mr. Vaughn: That is correct.

Mr. Coyle: Yes, sir.

The Court: All right.

Mr. Coyle: My point is only that one dot indicates more than one.

The Court: Well, it could be, that's right. I quite agree it could be, but just how many I don't know.

Mr. Coyle: And there is testimony in the record that Von's has between three and six thousand customers at Von's stores, so——

[fol. 1887] The Court: By the way, counsel, how do they arrive at how many customers a store of this kind has?

Mr. Vaughn: I don't know. Mr. Von'der Ahe can testify to that, he testified to that in his deposition——

The Court: Well, they obviously have some method of checking people, I guess.

All right, these will be admitted in evidence.

Mr. Vaughn: I think that is substantially the testimony of Mrs. Corey.

The Clerk: Those are Exhibits M, N, O, P and Q and R in evidence.

(The exhibits referred to were received in evidence as as Defendants' Exhibits M, N, O, P, Q, and R.)

The Court: It might turn out, as a famous poll did back in—the magazine took a poll and showed a complete clear-cut election of Mr. Hoover in 1932. But I think that was the end of the Literary Digest, was that the name of it?

Mr. Alsup: That's right.

Mr. Vaughn: We suggest that these people have learned something since that time, your Honor.

The Court: Maybe it is not to be so sure.

(Laughter in the court room.)

Mr. Vaughn: Your Honor, Mrs. Corey's affidavit also [fol. 1888] refers to Exhibits S through Z. Those exhibits are prior studies done by Mrs. Corey for Von's, which reflect a number of things about the Los Angeles Metropolitan Area, including the draw area of various stores and the intensity of competition in the area generally, the number of stores Von's has to compete with, their number and location and the like.

These have a two-fold significance which shows what it shows. It also shows that the sampling methods which were employed by Mr. Corey in her study for the previous exhibits were substantially similar to those which she had performed in the past and on which Von's and other grocers relied.

The Clerk: S and T are book exhibits. The others are charts.

Mr. Vaughn: No, they are all book exhibits, I am quite sure.

The Clerk: I see.

Mr. Vaughn: The red books there.

Mr. Clerk: I have it U, V, W, X and Y—here they are.

Mr. Vaughn: And, your Honor, we can furnish additional copies of any of these which you might want.

The Court: Well, I don't think it will be necessary, counsel.

Any objection?

Mr. Coyle: No, your Honor.

[fol. 1889] The Court: They will be admitted.

The Clerk: That is Defendants' Exhibits S, T, U, V, W, X, Y, and Z.

(The exhibits referred to were received in evidence as Defendants' Exhibits S, T, U, V, W, X, Y, and Z.)

Mr. Vaughn: Now, your Honor, we tried to approach this problem from another way, and in that connection I would like to offer in evidence under the letters BE the affidavit of Victor Hinson, who is also an officer of Von's.

The Clerk: I have marked Defendants' Exhibit BE for identification.

The Court: Any objection?

Mr. Coyle: We object to the exhibits, but not to the affidavit itself.

The Court: What are the exhibits?

Mr. Vaughn: Your Honor, Mr. Hinson had the store managers of Von's and Shopping Bag stores which the government said were competing make a list of all of the persons cashing checks at the Von's and Shopping Bag stores, the first 200 persons on a given Saturday and Sunday or over a given period of time.

He then got their addresses from their checks, had his secretary put a pin in these maps at their address. Sometimes he couldn't get—he had too many addresses for the [fol. 1890] number of pins he had, and sometimes each pin represents more than two. But it is intended again to show the pattern and to show that there was no substantial competition between Von's and Shopping Bag stores prior to the merger.

The Court: Any objection, counsel?

Mr. Coyle: Yes.

Mr. Vaughn: We have four of these maps in addition to the lists of checks from which these were prepared. And all of those are lists of addresses—I should say of cus-

tomers as Exhibit AA, the maps, three of which are over there and one over here (indicating), are Exhibits AD through AE.

Mr. Coyle: Your Honor, the basis for our objection to this is that it was introduced to show there was little or no competition between Von's and Shopping Bag prior to the merger.

Our objection is based on the fact that this study was taken subsequent to October, October and December of 1960, which was fully eight or nine months after the acquisition. Obviously there was no competition afterwards. But this doesn't show that there was no competition prior to the merger.

People naturally would go to the Von's or Shopping Bag stores to cash their checks. This was subsequent to the acquisition.

[fol. 1891] The Court: Yes.

Mr. Coyle: And they are purporting to show that this is subsequent to the acquisition, people living in the vicinity of the Shopping Bag stores—Von's and Shopping Bag stores it was then—went to that store to cash their checks, which would indicate that they wouldn't have gone to the other store prior to the merger. Well——

The Court: No, there is nothing—again, it is nothing more than a sampling——

Mr. Coyle: But it was taken subsequent——

The Court: I take it is is just a trend of people, on the theory they are habit-forming, that people go back to the usual place, and even if you change the name of the store they will go back. I take it that is the theory.

Mr. Vaughn: Yes. If I may be heard on this, your Honor——

Mr. Coyle: That is not what it shows, your Honor. The theory of this exhibit is that people who reside in the neighborhood of the Von's store don't go to the Shopping Bag store and cash their checks.

And it was taken after the Shopping Bag stores went out of independent existence.

The Court: Well, the best it could do would be to go to weight, it seems to me, and that would be whether or not the court would decide that human beings are such that as [fol. 1892] a matter of habit they would go back to a

Shopping Bag store, even after it had been changed to the name Von's.

Mr. Vaughn: The name wasn't changed, your Honor.

[fol. 1893] The Court: I am saying that even if it had been changed to the name Von's, the people would more or less by habit go back to the same store, wouldn't they, counsel?

Mr. Coyle: I don't know what people would do, but I know——

The Court: Well, you are a person, you know what you would do, you would go back usually to the same store, wouldn't you?

Mr. Coyle: No, I wouldn't, if two of the chains merged, I would know enough to know that the store closed, that it wasn't the same store.

The Court: That isn't the point, though. But if you went to cash a check, you would go back to the same place that you had known, wouldn't you?

Mr. Coyle: No, these people have check-cashing cards, that is where they got the addresses from anyway, you got it from the cards.

The Court: Well, at best it would prove, it seems to me, an indication, merely a survey showing the trend of human beings, what they were doing in the area.

Mr. Coyle: There is no trend to it, it would show what they were doing at a given time, which was eight months after the acquisition. It shows that eight months after the acquisition the people who lived closest to the Shopping Bag store, formerly Shopping Bag store, went back to the [fol. 1894] Von's-Shopping Bag store to cash their checks because it was closest to their residence.

The Court: I don't know how it shows that, I don't follow you.

Mr. Coyle: That is what it shows, it plots, it shows that people can cash checks, the addresses of the people who cashed checks at the Von's and Shopping Bag stores.

The Court: That is what I understand.

Mr. Coyle: But it took the plot of people who cashed these checks nine months after——

The Court: I understand that, too, but I am talking about the question of—for whatever weight it has indicating the habit of the people. Do you think that people

change their habits just because they read in the newspapers that there had been an amalgamation of two corporations?

Mr. Coyle: Certainly they do, a housewife isn't going to go five miles away to shop at a Von's-Shopping Bag store when there is one two miles away, your Honor.

The Court: Well, you may be right, I don't know.

Mr. Coyle: I mean housewives know when these acquisitions taken place, they know they have the same line of merchandise at both stores.

The Court: Where do you get your haircut? Suppose [fol. 1895] they change the name of the barber shop and had the same barber there, would you go——

Mr. Coyle: That is personal service.

The Court: Well, is personal service involved here?

Mr. Coyle: I am certainly not going to pass a Shell Oil station to go to another Shell Oil station that is maybe five minutes further on.

The Court: Well, I don't know whether you would or not. I have done it.

Mr. Coyle: That is slightly different, there is a different service station operator involved.

The Court: What is the grounds of your objection?

Mr. Coyle: My objection is that this study purports to show shopping habits prior to the acquisition——

The Court: You mean after the acquisition.

Mr. Coyle: It was introduced to show shopping habits prior to the acquisition.

The Court: I don't think it shows that.

Mr. Coyle: That is my objection.

The Court: Well—

Mr. Vaughn: Your Honor, I think Mr. Coyle has a point that goes to the weight of these exhibits. Obviously we couldn't create all of these exhibits before this lawsuit was filed. I think we did pretty good to have Mrs. Corey [fol. 1896] prepare before the lawsuit was ever filed.

I think it is subject to the objection which Mr. Coyle has made, I think the objection should go to the weight.

The Court: Well, I think I will admit it. And I am frank to say the weight, though, may not be too great. I will consider it in the light at the time it was made and in view

of counsel's statements I see now your point. It may well not be persuasive of any probative fact.

Mr. Vaughn: Well, there was still Von's and Shopping Bag. I don't know how many of these housewives know there was a merger between Von's and Shopping Bag. I can assure you my wife didn't know until I told her.

The Court: Well, the reason I raised the point, counsel misunderstood me. He thought I was saying that the name had been changed on the store.

I was talking about a suppositional situation where you actually change the name. In other words, there is an acquisition and then you put the name of the acquiring company on the stores. I am wondering even then what customers would do if a store was nearer, whether they would still go to the store farther away and say, well, now that it is owned by the same people I will go to the closest store.

Mr. Vaughn: I agree, your Honor.

The Court: I don't know.

[fol. 1897] Mr. Coyle: If your Honor please, the advertising was changed immediately. They published single ads and I am sure that housewives read those ads——

The Court: That could be quite a problem, quite a problem. All right, I will admit it for whatever weight it has.

The Clerk: The affidavit and the four charts?

The Court: And the four charts.

The Clerk: That is Defendants' Exhibit BE which is the affidavit. And the four charts——

The Court: Now four charts, I was just talking about one chart.

Mr. Vaughn: No, there were four charts.

The Court: Do they do the same thing?

Mr. Vaughn: The same thing in different areas.

The Court: They will be admitted.

The Clerk: That is Defendants' Exhibits BE, AA, AB, AC and AD.

(Documents marked Defendants' Exhibits BE, AA, AB, AC and AD were admitted in evidence.)

Mr. Vaughn: And AE.

The Clerk: And also AE.

(Document marked Defendants' Exhibit AE was admitted in evidence.)

The Clerk: What was that again now?

[fol. 1898] Mr. Vaughn: AE is the list of names and addresses which was worked from AB through AE on the maps.

The Clerk: Oh, there are five, that's right. This one here is AA.

Mr. Vaughn: Yes.

The Clerk: That includes AE. Admitted.

The Court: What is this thing you are referring to?

The Clerk: Hadn't you looked at it?

The Court: No. I would like to know what it is.

Mr. Vaughn: Those are lists of names and addresses that were supplied, that Mr. Hinson supplied, supplied to him by the store managers from which he——

The Court: It is nothing more than supporting data, I take it.

Mr. Vaughn: That is correct, supporting data.

The Court: Any objection?

Mr. Coyle: I have no objection where it goes in or not. I think it is supporting data.

The Court: All right. It is in for that purpose only.

Mr. Vaughn: Now your Honor, I would like to offer as Exhibit BF the exhibit of Roy L. Bouque. This is a sticker which I would like to have——

The Court: With one guess I can guess he is an economist, I take it.

[fol. 1899] Mr. Vaughn: He is a market, market consultant. With the firm of Lybrand, Ross Bros. & Montgomery. He has conducted a number of—he has done a number of things for us in this case in an effort to deal with a number of issues.

The first thing that he did was—first of all let me explain that all of this over-all evidence, is subject to certain clarifications, in my opinion. You cannot precisely determine the overlapping area of any given store with any of these surveys. You can get a general impression.

Perhaps the best people to tell you about what these overlaps are are people in the industry, like Mr. Von der Ahe, who has chosen the stores, the sites, many of them in the past, and who knows where his customers come from.

But in order that we could give your Honor every conceivable approach to this problem we had what I think can be fairly classified as theoretical studies. They have concluded, based upon evidence which was satisfactory to them, and which is convincing to me, that each store had a drawing area of from one and a half to two miles. They plotted that on the map.

Then in an effort to—and here is the Garden Grove area—in an effort to—blue is the Shopping Bag and red is the Von's—in an effort then to determine what the drawing area of the store is they considered competing stores of the major chains.

[fol. 1900] They then considered, on overlay No. 2, barriers to traffic which might exist in this theoretical draw area of one and a half to two miles—I might say that those circles around here (indicating on exhibit) represents a draw area of one and a half for the inner circle and the outer circle is a draw area of two miles.

Now these areas to traffic they considered as complete barriers to traffic flowing to a particular store, unless there was evidence to indicate to the contrary——

The Court: By barriers do you mean congestion or something of that kind?

Mr. Vaughn: No, I mean freeways, to which streets dead end into freeways, you can't get through. This is also true in some instances of railroad tracks and rivers, and other barriers, all of which are noted and described in the affidavit, and are depicted on the maps.

They then also took census data—and this shows the various census tracts, the number of people living in the census tract, the number of dwelling units, and they tried to determine how many people were actually living in an area which could be served by both the Von's and the Shopping Bag Stores, taking into account competition and the barriers to traffic.

And they have come up with counts, all of which are revealed in the affidavit and its appendix.

[fol. 1901] Finally, this is done—as you know this case has been on file for about three years, your Honor—and we came to a point where this was pretty out of date. So we had them prepare a final overlay which shows the competing stores which have come into the area since the merger,

or since December 1960 actually, which is the final overlay (indicating on exhibit).

By the way, the purple squares are discount houses which sell food. And this shows competition that has come into the area since the merger.

The yellow squares are stores operated by concerns which could not be regarded as major chains.

I also should say that we could not put on this map all of the stores that are in the particular communities of the Von's-Shopping Bag Stores, the task was just too great. So we limited ourselves to stores of major chains, and wherever possible, stores of small concerns.

The Court: Any objection?

Mr. Coyle: Yes, your Honor. I object to this exhibit on the ground that—these exhibits on the grounds that the witness Bouque didn't do the work, didn't supervise the work, had nothing to do with the work, and the work was all completed prior to the time he made his affidavit. It was done by two men from New York, Dr. Fabian and another doctor from New York who did the work. And this man Bouque——

The Court: This man who?

[fol. 1902] Mr. Coyle: This man Bouque, B-o-u-q-u-e, who furnished the affidavits—rereading from the deposition, page 10 of the deposition, line 25:

"Q. Who made the original assumption that there was a possible trading area of one and a half to two miles?

"A. As to the individual who made this particular decision I would assume it was made on the basis of a team operation. That is the way we do our work, that you have a man in charge who is the principal in the firm or a partner supervising the job and other staff men. Based on the facts that they gather from observation and from talking to people and from reading and studying, from these facts they develop their conclusions and made their assumptions.

"Q. You say it is generally agreed by the retailers. How many retailers were interviewed in connection with this project?

"A. I am not familiar with the exact number.

"Q. Do you know whether they had a sample or made a survey?

"A. I know that they talked with various retailers about this during the course of the examination. I know the staff was out making interviews. The exact [fol. 1903] number I don't know. These interviews were made by Dr. Fabian.

"Q. Is Dr. Fabian from New York?

"A. Dr. Fabian was from New York.

"Q. And he is employed by Lybrand, Ross Bros. and Montgomery?

"A. He was employed. He is no longer with the firm at this time.

"Q. You state that you have familiarized yourself with their records. How many retailer interviews have you read, did they make reports of these retailer interviews?

"A. None that I am aware of. There is such a mass of data in the file that it fills a couple of file drawers, three file drawer cabinets.

"Q. And in familiarizing yourself with the working papers you never ran across any of these retailer interviews that they made?

"A. No, I did not."

This is the witness that they are introducing in these exhibits, your Honor.

Mr. Vaughn: As a matter of fact, your Honor, unfortunately both men who were responsible for this project in 1960 are no longer with Lybrand, Ross Bros. and Mont- [fol. 1904] gomery, they reside in New York and they are not available to us. But this was a team effort, they had a team working on it.

Mr. Bouque is a partner of the firm and he testified on deposition further as follows:

"Q. You yourself made no survey or no study in connection with the field work that was done in 1960 because you weren't associated with the project at that time, is that correct?

"A. Since the time I have become involved in the particular studies under discussion here I have reviewed the working papers, familiarized myself with

the reports, reviewed the conclusions that were drawn and the assumptions made, and am in complete concurrence with the facts shown by our staff at the time as presented in the affidavit."

He also points out in different instances in his testimony that this is the way accounting firms ordinarily work. You don't have one man do everything, this is a team effort and comes out as a study which the firm—which the partner—Mr. Bouque is a partner in the firm—which the firm stands behind. And I think it ought to be admitted for that reason.

The Court: Well, let's just examine it a moment to find [fol. 1905] out if it is admissible under the rules of evidence.

In every case that I can think of involving accounting most of the work was done by people who do not give the final opinion. The man who gives the opinion goes over facts and figures which are made by others. Isn't that correct?

Mr. Vaughn: Yes, sir, and I have cases here——

The Court: And the opinion is based upon many, many items of hearsay.

Now, in eminent domain cases, even there they have assistants who go out and check the distances, check the locations, check many, many things. Many of these expert appraisers take the stand—I remember one that hadn't even been out to the property. Yet their opinions are admissible in evidence.

It seems to me that this question is, first of all, is this man an expert? If he is not an expert, then his testimony is not admissible.

[fol. 1906] Mr. Vaughn: I think he established during the course of his deposition and other wise that he is a management consultant who customarily worked in management consulting fields for Lybrand, Ross Bros. & Montgomery to solve any number of problems that might arise that might be referred to them by their clients.

Mr. Coyle: If your Honor please, I don't think that this man was qualified as an expert. This is an accounting firm, not a market research firm.

The Court: Some of these accounting firms, you know, do business—for example, I can give you one name—I

won't name them—who do, for example, the hotel and restaurant business, who do practically all that type of work. Their opinion as experts, although they are accountants, would be probably better than some of the hotel executives that run hotels.

Mr. Coyle: That may be so.

The Court: In fact they are called in to find out what is wrong with hotels.

Mr. Coyle: This man was not a partner of this firm when that survey was taken——

The Court: That wouldn't matter, counsel. He could still be an expert.

Mr. Coyle: He didn't review the files, he didn't go through anything here, he didn't know what use were made [fol. 1907] of them, if any was made, he wouldn't know the basis for establishing these barriers, he just signed an affidavit that the firm prepared.

The Court: Is this a compilation of information based upon an exhaustive research by the firm.

Mr. Vaughn: Yes.

Mr. Coyle: It is based upon research that was done under Dr. Fabian's supervision. He is the man that supervised this. He is the research expert who set up this whole program and supervised it. And he would know the basis for all these various conclusions and opinions.

The Court: Well, what you are trying to say, counsel, is that this man is not an expert?

Mr. Coyle: One, he is not an expert.

Two, he didn't do the work, he didn't supervise the work, he had nothing to do with the work. He came in after the work was completed and accepted the conclusions of his predecessor.

The Court: Well, we even permit the government to put in charts of people that sit in the court room here and listen to testimony and then they prepare these charts of what has been testified to which, as far as they are concerned, is pure hearsay. They have no personal knowledge of it. And they let experts get on the stand and explain all those charts.

[fol. 1908] Mr. Coyle: I have no problem with the experts getting on the stand and testifying to charts they have supervised——

The Court: Where is the prejudice in this? Let's find if there is any prejudice. Is there any prejudice here as to your side in this? This document AF, is that what we are talking about, BF?

Mr. Coyle: That is correct, your Honor.

The Court: What is the prejudice?

Mr. Coyle: The prejudice is that it is hearsay testimony. We took the deposition, we couldn't get an answer from the man, couldn't get answers from the man because he didn't know the work.

Mr. Vaughn: I think you got all the answers.

The Court: Now you say you couldn't get the answers.

Mr. Coyle: No. I asked him how many retailers there were in the area, what were his conclusions based on that a retail chain has a drawing area of one and a half to two miles, and he said he didn't know.

Mr. Vaughn: That is not entirely correct. He said he knew interviews were conducted but he couldn't tell you the specific details about it.

Mr. Coyle: Or how many—he had never seen any of the interview reports, he just talked it over——

[fol. 1909] Mr. Vaughn: He said that he based the two-mile draw area on specific documents as well, the studies, documents that are in evidence here——

Mr. Coyle: He said Dr. Teborn Fabian based it on Dr. Corey's studies.

Mr. Vaughn: I will accept that amendment.

The Court: Is that correct?

Mr. Vaughn: That is correct. Lybrand, Ross Bros. & Montgomery as a firm not working on this project relied in part upon surveys conducted by Facts Consolidated which showed that the vast majority of the customers come within two miles of the store. And it seems to me that if that assumption is incorrect in any case the government is certainly free to show that the draw areas are greater.

The Court: That isn't the question, counsel. The question is whether or not this is a trustworthy document within the meaning of the evidentiary rule, if it meets the test.

Mr. Vaughn: Yes.

The Court: And it is a question, if all this man has done is just sit down and just go over papers of other people, it does raise some questions.

Mr. Vaughn: It seems to me the——

The Court: Now on an accounting job they are allowed to go over all the books and records, but they are not [fol. 1910] necessarily original records.

Mr. Coyle: But that is a different thing, accounting.

The Court: What is different about it?

Mr. Coyle: Accounting is different. You don't have to make these value judgments.

The Court: Why, that is all accounting is. Don't ever let anybody tell you differently. Accounting is not mathematics, it is labeling. All accounting is is labeling.

Mr. Coyle: That may be.

The Court: You can take $5.80 and wreck a set of books by just labeling it wrong, $5.80, put the wrong label on it and put it in the wrong account and you will never get your books back in balance.

I know a lot of people think to the contrary, but believe me, accounting is labeling.

Well, have you both said all you care to say on the subject?

Mr. Vaughn: I would like only to point out, your Honor, that the cases establish that there is a great liberality——

The Court: There has to be, there has to be.

Mr. Vaughn: In antitrust cases. I think that these documents ought to be accepted subject to Mr. Coyle's objections going to their weight.

[fol. 1911] Mr. Coyle: If your Honor please, our objections don't go to weight.

The Court: No, he is objecting on the ground that this man is not presented really as an expert. I think that is his main objection.

Mr. Coyle: That's right.

The Court: He is a compiler, he is a compiler. What he is saying is that he has compiled without being an expert.

[fol. 1912] Mr. Coyle: He has hardly even compiled. There are a few figures that he compiled, but generally he didn't compile, he took their conclusions, the conclusions of Dr. Fabian.

The Court: The only trouble about documents of this kind, I don't know whether there is any prejudicial error in it or not. I can't tell without reading it.

Since we don't have a jury it seems to me there ought to

be a great liberality in connection with these documents. And I assume that it certainly would be unfortunate to admit a document and have this case reversed because of some admission of some document. The clients would have a pretty expensive ordeal to go through again.

I suppose the way to slow these antitrust cases down is to take away all the deductions so that the expense of the case would not be deductible and charge the cost to the Government. Then maybe we wouldn't have so many of these cases.

You think there is prejudice in this, counsel?

Mr. Coyle: I think there is prejudice in hearsay evidence.

The Court: That doesn't follow at all.

Mr. Vaughn: Your Honor, may I——

The Court: There are many, many times hearsay evidence goes in and has no effect on the trier of facts at [fol. 1913] all.

Mr. Coyle: As I say, I think this is again as to that same issue that we have been objecting to all along.

The Court: Well, on that score I will overrule you because I am admitting it on——

Mr. Coyle: I understand that, I understand that. But to that extent I don't think there is any of this exhibit which is prejudicial.

The Court: Oh, all right. I will admit it then.

Mr. Coyle: But on the other hand it is hearsay evidence.

The Court: I will admit it.

Mr. Coyle: I didn't say that——

The Court: I will admit it then, your main objection goes——

Mr. Coyle: I object to this because it is hearsay evidence.

The Court: Your main objection goes to—you change your grounds awful fast, counsel. A moment ago you gave me the impression that you were basing your objection mainly on the fact that it related to evidence having to do with competition between the Von's and Shopping Bag stores.

Mr. Coyle: You asked me whether I thought it was prejudicial.

The Court: And you gave me an answer.

[fol. 1914] Mr. Coyle: I said any hearsay evidence is prejudicial.

The Court: That just isn't so. Much hearsay evidence has no weight at all, couldn't be prejudicial. That may be the situation here.

Mr. Coyle: If this has no weight——

The Court: Just because it is hearsay doesn't mean it is prejudicial. I think I will—you have convinced me it should be admitted. I think I will admit it, you have convinced me it should be admitted.

The Clerk: That is Defendants' Exhibit BF in evidence.

(The exhibit heretofore marked Defendants' Exhibit BF was received in evidence.)

Mr. Vaughn: Your Honor, that is not all that that affidavit deals with. The maps, we have shown your Honor one. All of the rest of them are substantially the same.

The maps are Exhibits AG, AI, AJ, AK, AL, which deal with different areas. I would offer those exhibits.

The Court: Now are those the over covers that——that is all one exhibit, isn't it?

Mr. Vaughn: No, we have in all——

The Court: That is one exhibit with all of the over covers, that is one exhibit?

Mr. Vaughn: One exhibit, yes, your Honor.

[fol. 1915] The Court: What exhibit is that?

Mr. Vaughn: This particular one is AK. The remainder over here have been marked by the clerk.

The Court: Now, as I understand it this all relates to competition between the stores.

And it is being admitted only on that issue.

Mr. Vaughn: Only on that issue, correct, yes, sir.

The Court: If I understand you correctly, counsel for the Government, you are contending that the court has to decide this on the competition of the entire area.

Mr. Coyle: That is correct, your Honor.

The Court: So I am going to allow it in evidence for whatever value it may have. I may decide with you, I don't know, I can't tell.

The Clerk: Are the five charts admitted?

The Court: They are admitted.

Mr. Coyle: Your Honor, I might note that we do have a deposition of Mr. Bouque, perhaps——

The Court: That will be admitted also and copied into the record succeeding the affidavit.

Mr. Coyle: I think it definitely shows the hearsay nature of this evidence.

The Court: It may well be that this man's testimony is such, from what you say it will have very little weight, if he has just compiled some things—I don't know [fol. 1916] until——

The Clerk: Will the deposition referred to at this time be copied in, Mr. Bouque?

Mr. Coyle: That is Roy Lawrence Bouque.

Mr. Vaughn: Now, your Honor, we will supply you with another document.

[fol. 1917] Mr. Vaughn: Now your Honor, we will supply you with another document.

During the course of the deposition, Mr. Coyle, ultimately, after we had—I am not criticizing Mr. Coyle because I understand his problem—Mr. Coyle asked Mr. Bouque to provide him with a document which would state whether or not these barriers to traffic were regarded as complete barriers to population going to particular stores. And Mr. Bouque was not able to answer that question in each individual case.

The Court: Now wait a minute, counsel. You have got me confused. You say prevent population, you mean——

Mr. Vaughn: Prevent people from going to, shopping in a particular store.

The Court: I see.

Mr. Vaughn Mr. Coyle's question was would these barriers to freeways, to railroad tracks and other be regarded as complete barriers to people going to this store, and making the determination which was reflected in these exhibits.

The Court: I will anticipate that he said they weren't, is that right?

Mr. Vaughn: Well, Mr. Bouque said he didn't know in every case.

So Mr. Coyle said, will you supply us with a letter which would state the facts.

[fol. 1918] And Mr. Bouque has then gone back and reviewed each one of these maps and made his determination. And he has sent a letter, which is addressed to me, which

says that they were regarded as complete barriers in every case, unless otherwise noted in a discussion with respect to a particular store in the affidavit.

And Mr. Coyle's question was——

Mr. Coyle: This is what I anticipated, your Honor, that the witness' testimony, if it was read——

The Court: This is just a complete conclusion is what you are saying, is that right?

Mr. Coyle: It indicates—the letter is not by Lybrand, Ross Bros. & Montgomery, is not even signed by this witness.

The witness himself testified that he didn't think these barriers should be complete barriers.

Mr. Vaughn: I think that is a misunderstanding——

Mr. Coyle: You will have to read the deposition.

The Court: Let me see the letter, pass the letter to me, Mr. Clerk.

(The documents were handed to the court.)

The Clerk: The affidavit BF, and five charts, AG, AI, AH, AK and AL——

Mr. Vaughn: I produce this letter, to be fair this helps Mr. Coyle. This is for Mr. Coyle, he was trying after two [fol. 1919] days of depositions——

The Court: I don't think, counsel, it has much weight. I will tell you very frankly it doesn't impress me as having the weight of a neutrino—you know what a neutrino is.

Mr. Coyle: I wasn't objecting to it either, your Honor.

The Court: Well, I will admit it, for whatever weight it may have.

Mr. Vaughn: I was just trying to be fair to Mr. Coyle.

The Court: All right, counsel. I know you want to be fair.

The Clerk: Is it intended to be an exhibit?

Mr. Vaughn: Yes, I will—I am willing to offer it as an exhibit.

The Court: It is admitted. Mark it and admit it.

Mr. Coyle: I would suggest it might be copied in after the deposition.

Mr. Vaughn: That would preserve our exhibit list.

The Court: That may be done. Mark it as an exhibit to be copied in after the deposition.

The Clerk: It is Exhibit BG in evidence.

(Documents marked Defendants' Exhibits BF, BG, AG, AI, AH, AK and AL were received in evidence.)

[fol. 1920] The Court: Counsel, I think we had better take a recess. It is 3:20. Let's give the reporter a rest. How much time do you want, ten or fifteen minutes?

Let's make it a 15-minute recess.

(Short recess.)

[fol. 1921] The Court: All right. Proceed, counsel.

Mr. Vaughn: To stay with Mr. Bouque, but to move from the theoretical to the statistical, there is no question of the theoretical approach to the problem, there is no question that Mr. Bouque made surveys.

Also Mr. Bouque's affidavit refers to certain statistics concerning the sales, number of stores and market shares of the leading concerns in the Los Angeles metropolitan area. Those exhibits which for the most part Mr. Bouque relied on for years for individual companies, which were obtained by the FBI, as counsel for the Government said, and turned over to the defendants under court order, those exhibits are Exhibits AM, AN, and AO, which I now offer in evidence.

Mr. Coyle: Your Honor, we have no objection to that.

The Court: Very well. They will be admitted.

The Clerk: That is Defendants' Exhibits AM, AN, and AO in evidence.

(The documents marked Defendants' Exhibits AM, AN and AO were received in evidence.)

Mr. Vaughn: They purport to show by it the various shares of the market of the leading chains in 1960, taking them all the way back to 1948. That is Exhibit AM. And also the percentage of shares of the market for various [fol. 1922] groups of chains for the years 1950 through 1960, depicting both in tables and graph form.

Now, Mr. Bouque has one more map dealing with one more aspect of his study which determines the broad area of discount houses, which is the evidence as shown, which are a relatively new form of competition in the Los Angeles metropolitan area.

Mr. Bouque, with the aid of the security department, took the—well, I am ahead of myself.

First of all, Von's on its own, independent of this case, as I understand it, wanted to know what the draw area of various discount houses were in the Los Angeles metropolitan area.

So they went into the parking lots of three of those discount houses and they took down the license numbers of cars in those parking lots.

Then they took a sample of those license numbers and found out the addresses of the people who owned the automobiles.

And they came up with a conclusion which has been depicted by Mr. Bouque graphically on this map, showing by a line stretching out from the discount houses involved the distances which people traveled from their homes to the discount houses.

The Court: Where are the discount houses located?

[fol. 1923] Mr. Vaughn: This is one down here in the Long Beach area (indicating on exhibit). This is a Big A discount house out in the Valley (indicating). And this, I believe, is a CMA discount house down in Anaheim.

And these lines run to the various homes of the individuals whose cars were seen in the parking lots.

Now, Lybrand felt that the sample which was used by Von's security people may not have been adequate. So they went out to the same discount houses and did the same thing. This time they wrote down many more driver's license numbers and vehicle numbers and plotted the information they had obtained from that source out, using again the Department of Motor Vehicle for that information, the draw areas of these discount houses.

I might point out that this time the information obtained by Lybrand generally substantiates what Von's people found in their earlier survey, and shows the discount houses that sell food have a broad and wide drawing area, and that a very substantial number, 75 per cent or so of the customers, I believe that is the correct figure, your Honor, come from within this six-mile draw area.

The Court: Is the evidence going to show here what kind of food is distributed by these discount houses?

Mr. Vaughn: Yes, your Honor, it will.